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THE MISCELLANEOUS REPORTS.

CASES DECIDED

IN THE

COURTS OF RECORD

OF THE

STATE OF NEW YORK

OTHER THAN THE

Court of Appeals and the Appellate Division of the Supreme Court.

JOSEPH A. LAWSON, REPORTER.

VOLUME XCV.

1916

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‡ Appointed by the Governor, January 1, 1916, vice George L. Ingraham, resigned.

§ Appointed by the Governor, February 9, 1916, vice John J. Brady, deceased.

‖ Appointed by the Governor, April 19, 1916, vice Samuel T. Maddox, deceased.

¶ Appointed by the Governor, February 22, 1916, vice James A. Robson, deceased.

** Appointed by the Governor, February 22, 1916, vice Arthur E Sutherland, resigned.

†† Appointed by the Governor, January, 1916, vice Edward Swann, resigned.

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† Appointed by the Governor, February 1916, vice Robert F. Thompson, resigned.
‡ Appointed by the Governor, January 3, 1916, vice William P. Platt, resigned.

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* Appointed by the Governor, March 22, 1916, vice Melvin E. Baldwin, deceased.

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THE

MISCELLANEOUS REPORTS

OF THE

STATE OF NEW YORK.

COMMENCING APRIL, 1916.

Matter of the Estate of FREDERICK MESSING, Deceased.

(Surrogate's Court, Niagara County, April, 1916.)

Executors and administrators — judicial settlement of accounts — rejection of disputed claim — Code Civ. Pro., § 2681.

Where no written consent that a disputed claim against decedent's estate be heard and determined upon the judicial settlement of the accounts of the executrices has been filed in the surrogate's office, and no action upon said claim has been brought within three months after its rejection, a motion to dismiss the claim which was rejected July 20, 1915, at which time section 2681 of the Code of Civil Procedure as amended in 1914 was in force, must be denied, and the claim be tried and determined on the judicial settlement.

MOTION to dismiss claim.

Dow Vroman, for claimant.

Smith & Maldiner, for executrices.

FISH, S. The claim of William H. Kinzly was duly presented to the executrices. It was rejected July 20, 1915, at which time section 2681 of the Code as

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amended by chapter 443 of the Laws of 1914 was in force. This section was further amended by chapter 644, Laws of 1915, taking effect September 1, 1915. No written consent that said claim be heard and determined upon the judicial settlement of the accounts of the executrices has been filed in the surrogate's office and no action was brought for the recovery thereof within three months after its rejection. The executrices assert that the claim is barred under the terms of said section as it read at the time of the rejection of the claim. Said section 2681 was a consolidation of former sections 2718 and 1822 of the Code redrafted and amended. The part containing the short Statute of Limitations is taken from section 1822 and it was well settled that this section 1822 was highly penal and should be strictly construed (*Broderick* v. *Smith*, 3 Lans. 26); and said section 2681, so far as the Statute of Limitations therein contained is concerned, is likewise highly penal and should be strictly construed. It is to be noted that said former section 1822 not only barred claimant from maintaining an action on his claim but also "from every other remedy to enforce payment thereof out of decedent's property." In the consolidated section 2681, as amended, the claimant is "forever barred from maintaining such an action," and the above quoted words from said section 1822 are omitted, thereby indicating that the legislature in the consolidated section did not intend to bar claimant from anything except the bringing of an action on his claim and intended to leave him open to pursue his remedy in the Surrogate's Court.

I think the true meaning of said section 2681 as it existed on July 20, 1915, is that where a written consent is not filed an action on the claim is barred after three months from its rejection; but in such case the claim is to be tried and determined on the judicial

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settlement. Judge Heaton who wrote the section so construed it in his work on Surrogates' Courts, last edition, at pages 1162, 1163.

Motion to dismiss claim denied.

Matter of the Final Settlement of the Accounts of WALTER S. SANFORD, as Executor of the Last Will and Testament of HELEN J. HARVEY, Deceased.

(Surrogate's Court, Chenango County, April, 1916.)

Statute of Limitations — when, begins to run — disputed claims against estate — when claim allowed.

Upon the hearing of a disputed claim against an estate it appeared that claimant docketed a deficiency judgment in foreclosure against decedent and another, having theretofore signed an agreement at the request of their attorney by the terms of which claimant was not entitled to enforce any deficiency judgment by execution until after the death of both defendants in the foreclosure action. It further appeared that both said agreement and a deed of certain real estate by decedent were recorded together. The other defendant in the foreclosure action died before the decedent herein, who used said agreement to discharge the lien of the deficiency judgment upon the real property sold after the docketing thereof. Held, that because of said agreement the Statute of Limitations did not begin to run until the death of decedent herein, and that the claim should be allowed, with interest from the date of entry of the deficiency judgment.

PROCEEDING upon final judicial settlement of the accounts of an executor.

Joseph M. Forsythe, for Walter S. Sanford, executor.

Ward N. Truesdell (Hubert C. Stratton, of counsel), for Edward Daniels, claimant.

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HILL, S. This is a claim presented by Edward J. Daniels against the above entitled estate. Objection was made thereto. It is heard by stipulation on final accounting before the surrogate.

In December, 1891, the claimant herein, Edward Daniels, started an action for the foreclosure of a real estate mortgage upon certain property owned by one Sarepta Harvey and the decedent Helen J. Harvey. The plaintiff was represented by Charles A. Fuller, his attorney, and the defendants were represented by D. L. Atkyns, an attorney then living and residing at Sherburne, N. Y., who has since died. The attorneys for the respective parties met at the office of Mr. Fuller on the 8th day of February, 1892. A stipulation on that date was made by Mr. Atkyns, attorney for the defendants, one of whom was the decedent, whereby he waived the service of all papers in the action, and it appears that attorney Atkyns produced at that conference an instrument entitled in the foreclosure action, the body of which instrument is as follows:

"This indenture made this 8th day of February 1892, between Edward Daniels party of the first part, the above named plaintiff, and Sarepta V. Harvey and Helen J. Harvey, parties of the second part, Witnesseth:

"That the said party of the first part in consideration that the parties of the second part have, at the request of the plaintiff, procured one Stephen Benton to release his lien upon the mortgaged premises, and that the defendant Sarepta V. Harvey has appeared by attorney in the above entitled action, and admitted the personal service of a copy of the summons and complaint herein, without actual service of a copy thereof to her, and for value received, hereby covenants and agrees that in case of a deficiency arising upon the sale in foreclosure, in the above entitled action, and

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the entry of a judgment therefor, he will at no time during the life of said parties of the second part, or either of them, issue any execution for the collection thereof against any property, real or personal, of the said parties of the second part, or either of them, nor resort to any legal or equitable proceedings for the collection thereof, except under the circumstances hereinafter mentioned, the purpose and intent of this instrument being that no part of such judgment shall be collected of any property of either of said parties of the second part, during their lives, or the life of either of them, or out of any fund, remainder or surplus arising from any sale of their property, to which they or either of them would be entitled, if it were not for such judgment, and it is further covenanted and agreed by the said party of the first part, that if the parties of the second part, shall at any time, sell or dispose of their real estate, then, and in that case, such premises are to be released from the lien of this judgment, or such judgment shall thereupon cease to operate or remain as a lien thereon, without a formal release.

" But if at any time, there shall be a sale of the real estate of said parties of the second part, or either of them, under such circumstances that neither of said parties of the second part could take any part of the proceeds of such sale, or of any surplus arising from such sale, did such judgment in favor of the plaintiff not exist, but such surplus would be taken by other liens subsequent to the lien of the plaintiff, instead of by said parties of the second part, or one of them, then and in that case, the judgment lien of the plaintiff shall remain as of its order of priority and be entitled to payment out of any such surplus, in preference to such later lienors.

" In Witness Whereof, the said party of the first

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part has hereunto set his hand and seal the day and year first above written."

Such instrument above quoted was signed by the plaintiff, Mr. Daniels, and acknowledged before a notary public, and same was taken away from the conference by Mr. Atkyns, attorney for the decedent and another.

The foreclosure action was run through to a sale. A deficiency resulted. On April 15, 1892, there was docketed in the Chenango county clerk's office a deficiency judgment resulting from such foreclosure in favor of Edward Daniels against Helen J. Harvey and Sarepta Harvey for the sum of $391.78. This instrument above quoted was recorded in Chenango county clerk's office on the 17th day of July, 1893, at three o'clock P. M. in book 191 of deeds, at pages 169 and 170. In the same book of deeds immediately following the record of such agreement signed by Mr. Daniels appears a deed given by Helen J. Harvey, one of the defendants, to George B. Whitmore, which deed bears date June 12, 1893. The record shows that the deed was filed for record the same day and hour as the above quoted instrument. The satisfaction of judgment mentioned in favor of Stephen Benton was satisfied as required by the agreement, which satisfaction was acknowledged on the 14th of June, 1893, and was filed in the clerk's office on the 17th day of July, 1893. Sarepta V. Harvey died several years ago, and prior to the death of decedent herein. The claimant herein presents a claim against the estate for the amount of said judgment, $391.78, and interest thereon from April 15, 1892. The executor has objected to the same, arguing that the Statute of Limitations has run, which is true unless the agreement deferred the running thereof.

The agreement was signed by the plaintiff at the

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request of the attorney for the defendants. Had the defendants, one of whom was the decedent, signed and executed this instrument, unquestionably it would have deferred the running of the statute, for the weight of the authorities permits parties to fix a limitation other than that fixed by statute. After the paper was executed by the plaintiff the attorney for the defendant took it away. The subsequent appearance thereof for record shows that it was adopted and accepted by the defendant. This decedent sold certain real estate, which except for the agreement would have been subject to the lien of the judgment. The purchaser apparently demanded and received the release of the lien of the judgment, for it was recorded the same day and hour as the deed from the decedent and in the same book of deeds.

In *Porter* v. *Magnetic Separator Company,* 115 App. Div. 330, a loan was made which by its terms was due and payable "As soon as the company (the borrower) was in a condition of financial ability to repay it." The court held that the Statute of Limitations did not commence to run until the defendant should show that the company did have financial ability to repay the loan. *Hobart* v. *Verrault,* 74 App. Div. 444.

On January 2, 1879, the defendant's intestate gave unto the plaintiff's assignor a promissory note dated that day for $6,000, payable six months after date. Thereafter and on January 31, 1881, the maker of the note indorsed thereon, " This note good only after my death," and signed the same. The maker lived until about September 28, 1899, and when the note was presented against the estate a defense of the Statute of Limitations was interposed. In the opinion the following language appears: " There was the fulfillment upon the part of the payee of forbearance in exercising his legal rights, and under such circumstances the

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personal representative should be held estopped from availing himself of the terms of the statute."

Rowe v. *Thompson,* 15 Abb. Pr. 377, is a case where a debtor procured his creditors to sign a statement, "We the creditors of Thompson agree not to sue or molest him for his indebtedness or the debts owing to us by him for two years." This statement was not signed by the debtor, but the court held that the procurement thereof by him removed the case from the operation of the statute. This case was cited with approval in the *Hobart* case, above mentioned.

The decedent in the case at bar sought to have the claimant execute and make the agreement in question. She accepted the benefits thereof. The claimant had a right to collect the judgment by execution, except for the agreement. He waived that right. This became an executed contract when decedent accepted it and used it to discharge the lien of the judgment upon the real property sold after the docketing thereof. The Statute of Limitations did not commence to run in my opinion until the death of both Sarepta V. Harvey and the decedent Helen J. Harvey.

By virtue of the agreement, the claimant under the terms of the agreement was not entitled to an execution to enforce this judgment until after the death of these parties. Section 376 of the Code of Civil Procedure, which fixes the limitation upon judgments, provides in part: "A final judgment * * * is presumed to be paid and satisfied, after the expiration of twenty years from the time, when the party recovering it was first entitled to a mandate to enforce it." The claimant never had a right to a mandate until the death of these parties.

The attorney for the executor raises the question that even if the face of the judgment is allowed against this estate in no event should interest be allowed.

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Section 1211 of the Code provides: "A judgment for a sum of money, rendered in a court of record, or not of record, or a judgment rendered in a court of record, directing the payment of money, bears interest from the time when it is entered." This judgment is the usual and ordinary judgment, and subject to all the laws of the date thereof except so far as same are modified by the agreement. I find no provision in that agreement limiting the accruing of interest.

I hold and decide that the claim with interest thereon from the date of the entry of the judgment should be allowed.

Decreed accordingly.

Matter of the Judicial Settlement of the Accounts of ADDISON J. CUSHMAN, as Executor of the Will of E. WATTS CUSHMAN, Deceased. (Claim of Leroy Lamb.)

(Surrogate's Court, Madison County, April, 1916.)

Fraud — attorneys — dower — sale of infants' real estate — when claim dismissed.

Decedent herein was the attorney for petitioners in a certain proceeding for the sale of infants' real estate who derived their title from one W., and was also his attorney in an action for divorce brought by him in which no final decree was entered because of his death within three months of the docketing of the interlocutory decree in his favor. In the proceeding for the sale of the infants' real estate decedent herein, who was one of their general guardians, testified that at the time of his death W. was unmarried, and the other general guardian, a sister of W., testified that he was a single man at the time of his death and that there was no one who had any dower right in the property. After claimant had purchased the property he dis-

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covered that it was still subject to the dower interest of W.'s widow who was living. Held, that it not appearing that decedent intended to mislead or defraud and not having profited by the misrepresentations, a claim against his estate for alleged fraud will be dismissed.

PROCEEDINGS upon the judicial settlement of the accounts of an executor.

Thomas & Burke (M. J. White, of counsel), for claimant.

Albert Smith Sheldon (Hitchcock & Murphy, of counsel), for executor.

SENN, S. Leroy Lamb, the claimant, has presented to the executor a claim for $900 for damages sustained by him through the alleged negligence of the deceased. He has also filed a claim for the alleged fraud of the testator growing out of the same transaction. Both claims were rejected by the executor and by consent have been heard by the surrogate.

Testator was an attorney and counselor-at-law and was attorney for the petitioners in a certain proceeding for the sale of infants' real estate, being the interest of Rena C. Stone and David F. Woodman, infants, who were the only heirs-at-law of said Seth J. Woodman, deceased. The testator was one of the general guardians of said infants, the other being M. Jeanette Woodman, an aunt. The petition in the proceeding was made by the guardians and infants named and recited among other things that the infants were the owners of the property as heirs-at-law of Seth J. Woodman, deceased, and that the premises were free from dower interests or rights. The testator was also the attorney for the petitioners in conducting the proceeding. The petition was verified by testator as

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well as the other petitioners and the papers were presumably prepared by the testator. This petition was presented to the Madison County Court and thereupon an order was duly made appointing Edward B. Stone, the husband of said Rena C. Stone, as special guardian, and James W. Welch, an attorney and counselor-at-law, was appointed referee to take the evidence in the proceeding. In the testimony before the referee, as appears from the referee's report, E. Watts Cushman, the testator, was sworn as a witness, and among other things testified that at the time of his death Seth J. Woodman was unmarried. M. Jeanette Woodman, the other guardian, was also sworn before the referee and presumably examined by the testator, acting as attorney, and among other things she testified as follows: "Q. Your brother, Seth J. Woodman, was a single man at the time of his death? A. Yes. Q. And there is no one who has any dower right or life estate or an estate for years in the property? A. No."

Upon the referee's report and the report of the special guardian an order was made directing the sale of the premises for a sum not less than $4,000, and on February 27, 1912, the special guardian made his report that he had made an agreement with Leroy Lamb for the sale of the entire premises and all the right, title and interest of said infants therein for the sum of $4,100 to be paid by said Leroy E. Lamb, and on or about February 29, 1912, the premises were conveyed in said proceeding from Rena C. Stone and David F. Woodman by their said special guardian to Leroy E. Lamb, the claimant, for the sum of $4,100 by deed dated that day and recorded in Madison county clerk's office March 4, 1912, in liber 234 of deeds, page 436.

It appears that Seth J. Woodman, through whom the infants derived the title to their real estate, was a

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married man and at some time before his decease brought an action, in which the testator was his attorney, against his wife, Cornia Woodman, for a divorce. An interlocutory judgment of divorce was obtained and docketed in Madison county clerk's office on March 18, 1907. Woodman died on or about the 6th day of June, 1907, less than three months after the docketing of the interlocutory decree, and hence no final decree of divorce was ever entered. Subsequently to his purchase of the premises the claimant discovered that no final decree had ever been entered and that therefore the premises he had purchased were still subject to the dower interest of Cornia Woodman, who was living. He employed attorneys to procure from her a release of her dower, which they were able to negotiate for the sum of $250. Their legal services and disbursements amounted to $149.69. It would seem under the circumstances that the widow settled for a reasonable sum.

The evidence in support of the claimant's claim is contained in the several exhibits which have been offered in evidence, including all the papers in the infants' real estate proceeding, the divorce proceeding, and the testimony of Edith Lamb, the wife of the claimant, who testified that she was present with the claimant in the law office of the testator in the latter part of February, 1912, and overheard a conversation between her husband and the testator. Witness and her husband went there to sign a mortgage which the claimant was to give to testator for $3,000 and to help him to raise the purchase price, which amount testator was to advance for that purpose, and evidently to receive the deed of the premises. She states that the deed was handed to her husband but that he handed it back and that before giving the mortgage and accepting the deed the following conversation

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ensued: "Mr. Lamb asked Mr. Cushman if Seth Woodman had a divorce from his wife and Mr. Cushman said yes, an absolute divorce, and he then asked him if he would guarantee the title to be good and he said yes he would absolutely guarantee the title to be good." That thereafter the mortgage was signed and delivered and the deed accepted.

The claimant's attorneys have practically abandoned their claim for negligence. They probably have concluded that there was no such privity of contract or employment between the testator and the claimant as to create a liability for negligence and that the testator owed no duty of diligence to the claimant. At any rate I hold such to be the law. But they seriously insist that either knowingly or unknowingly the testator practiced a fraud upon the claimant and thereby induced him to purchase the premises and pay the purchase price without deduction for the widow's dower. They insist that the testator was not only a party to the proceeding but the attorney conducting the same and not only falsely testified that Seth Woodman was unmarried but caused others to so testify, and that, when finally asked the direct question by the claimant as to the status of Seth J. Woodman with reference to his wife, he positively stated that there was an absolute divorce. This they claim constitutes a fraud upon the claimant and that his estate is answerable for the consequent damages, whether the testator profited by the transaction or not, and even though he may have believed that what he said was true; that as attorney for Seth J. Woodman he positively knew that no final decree had ever been entered in the divorce matter and that he must have known that none could be entered, and that the legal effect was to leave the dower rights of Cornia Woodman in full force and effect.

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I will say that it is my opinion, based upon the whole evidence, that the testator did not intend to defraud the claimant. It may be that he believed that the effect of the interlocutory decree, followed as it was by the death of Mr. Woodman, no cause having been shown in the meantime why the decree should not be made final, was to extinguish the dower of Mrs. Woodman. I can see how an attorney who had not examined the authorities, reasoning only upon the language of the Code (a relatively recent provision), might have reached such a conclusion. *Pettit* v. *Pettit,* 105 App. Div. 312; *Bryon* v. *Bryon,* 134 id. 320; *Matter of Crandall,* 196 N. Y. 130. Such a mistake in the law would probably constitute negligence, because the authorities were easily obtainable, but it may have been an honest mistake. Possibly his recollection was at fault and he may have thought that final judgment had been obtained. This would not be strange after a lapse of five years after the interlocutory decree was obtained. In a case of negligence he would probably be liable for such a mistake, for diligence would require him to examine the records and ascertain what was finally done in the divorce action.

But as the claim concededly cannot be sustained on the theory of negligence, the question arises whether the facts as presented constitute a case of actionable fraud; whether he misrepresented as to the material fact of Mr. Woodman having a divorce from his wife, when he knew or is chargeable with knowing that such was not the case. It does not affirmatively appear that Mr. Lamb relied on the representations, but I think it may fairly be inferred that he did.

As a general rule a known agent is not responsible to third persons for acts done by him in pursuance of an authority rightfully conferred. The agent is not liable to third persons for omission or neglect of duty;

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the principal alone is responsible. *Colvin* v. *Holbrook,* 2 N. Y. 126.

Though not liable for non-feasance he is liable for misfeasance (so held in a case of deliberate misfeasance and where the agent profited thereby). *Crane* v. *Onderdonk,* 67 Barb. 47.

For his own positive or willful torts the agent is liable to third persons. *Gutchess* v. *Whitney,* 47 Barb. 139.

A county clerk in making a search is only liable to the person for whom it is made, that is, the one who procures and pays for it. *Day* v. *Reynolds,* 23 Hun, 131. See also *Glawatz* v. *People's Guaranty Search Co.,* 49 App. Div. 467.

An attorney is only liable to his client when employed to examine titles to real estate. Where there is neither fraud, falsehood nor collusion, the obligation of the attorney to exercise reasonable care and skill in the performance of the designated service is to the client and not to a third party; where no such wrongful element exists, he is not liable for the want of reasonable care and skill at the suit of any one between whom and himself the relation of attorney and client does not in some manner exist. Where there is fraud or collusion the party will be held liable, even though there is no privity of contract. *National Savings Bank* v. *Ward,* 100 U. S. 195.

In a large number of cases the courts have emphasized that a party is not liable for fraud unless the false representations were made knowingly or with intent to deceive.

The element usually necessary to maintain an action for fraudulent representations is that the representation was known by the party making it to be false and was made with intent to deceive. So held in a case where the defendant in order to procure credit had

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materially understated the amount of his indebtedness to another party. *Stitt* v. *Little,* 63 N. Y. 427.

Where the defendant sold a steam engine and boiler which he represented to be in good working order and when taken down it was ascertained that it was not, the court held that, in the absence of evidence showing that the defendant knew of the defects, an action for fraud could not be maintained. *Lamb* v. *Kelsey,* 54 N. Y. 645.

The essential elements of an action for false pretenses are falsity, scienter, deception and injury. In a case where the defendant sold stock of "The National Lead Trust," representing that he had a right to do so when in fact the trust was an illegal combination and he had no right to sell its stock, the court held that no action could be maintained against the defendant for fraud unless he had knowledge of the falsity of his statements. *Unckles* v. *Hentz,* 19 App. Div. 166, citing *Hotchkin* v. *Third National Bank,* 127 N. Y. 337; *Meyer* v. *Amidown,* 45 id. 170; *Brackett* v. *Griswold,* 112 id. 467; *Arthur* v. *Griswold,* 55 id. 400.

Marsh v. *Falker,* 40 N. Y. 562, was a case where the defendant made to the plaintiff false representations concerning the responsibility of one Isaac Kahn, thereby inducing plaintiff to extend credit to said Kahn. It was held that the plaintiff could not recover. In a long opinion Judge Daniels, among other things, said: "In order to determine whether representations of actual knowledge of the existence of material facts be deceitfully or fraudulently made, or whether that may be properly and fairly inferred, regard must be had to the transaction in which they are made, and to the subject to which they relate; for, as to many subjects of trade and traffic, the acquisition of such knowledge is common, and, therefore, when imported by the representations made, it may be reasonably

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expected to have been intended that the person to whom they may be made should understand that to be their character. As to many other things, the possession of actual knowledge is exceedingly rare and exceptional, and when representations are made concerning them, they are usually understood as amounting to no more than the candid and sincere convictions of the person making them. They are expressions of opinion or judgment rather than absolute representations of fact, and as such are not necessarily fraudulent, though they afterwards turn out to be wholly unfounded and untrue. If they are made in good faith the person making them cannot justly or legally be held liable for the consequences resulting from them to the person who may afterwards act upon them. Upon this subject Chancellor Kent stated the law to be that 'misrepresentation without a design is not sufficient for an action; but if recommendation of a purchaser as of good credit to the seller be made in bad faith, and with knowledge that he was not of good credit and the seller sustains damage thereby, the person who made the representation is bound to indemnify the seller.' (2 Kent, 490.) This rule places the liability of the defendant upon the true ground, exonerating him where he may act in good faith and still err in his judgment, and rendering him responsible where he knowingly misinforms the applicant for the purpose of deceiving him."

The defendant's counsel calls my attention to some cases which seem to hold a contrary doctrine. *Bennett* v. *Judson*, 21 N. Y. 241, was a case where the defendant for the purpose of effecting a sale to the plaintiff of certain lands in the west made false and fraudulent representations in respect to their location, proximity to a river and railroad, agricultural qualities, etc., and on the trial claimed that he made the representations upon statements made to him by his brother who had

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formerly owned the lands, who in his turn derived his information from persons residing in the states where the lands were located and whom he had employed as agents for the payment of his taxes. The statement was made in general terms without referring to any other person as authority for its truth. The defendant had never been in the vicinity of the land. In that case the court held, in substance, that where the defendant made false statements and had no knowledge as to their truth or falsity he was liable for fraud. That was a pretty plain case of the defendant knowing that he did not have knowledge of the truth or falsity of his statements.

In *Wakeman* v. *Dalley*, 51 N. Y. 33, Judge Earl in his opinion says that the statement of the rule as made in *Bennett* v. *Judson* is not accurate without a number of important qualifications; "and upon the facts as they are reported in that case I entertain serious doubt whether the case was properly decided."

Hadcock v. *Osmer*, 153 N. Y. 604, is a strong case in favor of the claimant's contention. There the court stated that: "Where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not and it is actually untrue, he is guilty of falsehood, even if he believes it to be true; and if the statement is thus made with the intention that it shall be acted upon by another, who does so act upon it to his injury, the result is actionable fraud." This was a case where the defendant gave to the plaintiff the following paper to induce the plaintiff to loan to Delos Brown and Joseph Brown, who were indebted to the defendant, the sum of $400, viz., "Mr. Hadcock: The Browns are good for what money you let them have." Signed, "L. Osmer." Relying upon this information the plaintiff let the Browns have this

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money with which they paid their debt to the defendant and which the defendant had theretofore been unable to collect. I do not think that that case bears much resemblance to the one at bar.

In support of this strong dictum the court cites *March* v. *Falker* and *Bennett* v. *Judson,* above referred to, and also *Kountze* v. *Kennedy,* 147 N. Y. 124, 130. But in the latter case Judge Andrews in his opinion, among other things, says: "The representation upon which it is based must be shown not only to have been false and material, but that the defendant when he made it knew that it was false, or not knowing whether it was true or false and not caring what the fact might be, made it recklessly, paying no heed to the injury which might ensue. Misjudgment, however gross, or want of caution, however marked, is not fraud. Intentional fraud, as distinguished from a mere breach of duty or the omission to use due care, is an essential factor in an action for deceit. The man who intentionally deceives another to his injury should be legally responsible for the consequences. But if through inattention, want of judgment, reliance upon information which a wiser man might not credit, misconception of the facts or of his moral obligation to inquire, he makes a representation designed to influence the conduct of another, and upon which the other acts to his prejudice, yet, if the misrepresentation was honestly made, believing it to be true, whatever other liability he may incur he cannot be made liable in an action for deceit."

The claimant's attorneys cite cases to show that it is immaterial whether the testator profited by the fraud or not. That is true in case of actual, deliberate fraud. The fact that the testator had no motive in perpetrating a fraud is one of the reasons why I am of the belief that no fraud was intended by him. Besides the presumptions of law are against fraud.

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"Where a negative allegation involves a charge of criminal neglect of duty, whether official or otherwise, or fraud * * * the party making the allegation must prove it; for in those cases the presumption of law which is always in favor of innocence is in favor of the party charged." 1 Greenl. Ev., § 80. This doctrine is held in so many cases that it may be accepted as settled law and is in fact elementary.

I think it is clear from the authorities that where untrue representations are made in good faith and in the belief that they are true and the one making them does not profit by the transaction he is not liable.

Where one makes representations which are deliberately untrue, then it is immaterial that he did not profit thereby; if he profited thereby he may be liable, even though he believed his statements to be true. I think that in this way the apparent conflict in the decisions can be explained. Of course much depends on the special circumstances, as every case must, to a certain extent, be decided on its own facts and circumstances.

The testimony of Mrs. Lamb falls within the condemnation of a long line of cases which have held that testimony of alleged admissions by a deceased person, especially when given by one who is related to or connected with the claimant, is to be received with caution, great care, strict scrutiny and even suspicion. Notwithstanding, I am satisfied that Mrs. Lamb, to the best of her ability, told the truth and narrated the conversation between her husband and the testator substantially as it occurred and as correctly as she could remember.

Accepting the material portions of her testimony as entirely true, not being satisfied or believing that the testator intended to mislead or defraud, the testator not having profited by the misrepresentations, and not being legally liable to claimant for his negli-

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gence, I feel that I must hold, I admit with some regret, that this claim cannot be legally sustained. For that reason the claim is dismissed, without costs against the claimant.

Decreed accordingly.

Matter of the Final Judicial Settlement of the Account of Proceedings of WILLIAM VANDER ROEST and KATHERINE VANDER ROEST ALLES, as Executors of and Trustees under the Last Will and Testament of WILLIAM G. VANDER ROEST, Deceased.

(Surrogate's Court, Westchester County, April, 1916.)

Gifts — subject of — direction to executors or trustees to pay or divide — where future interest is devised — wills.

Where there is no gift but a direction to executors or trustees to pay or divide and to pay at a future time, the vesting in the beneficiary will not take place until such time arrives.

Where a future interest is devised, not directly to a given person, but indirectly through a power conferred upon trustees, the devise is designed to be contingent and survivorship at the time of distribution is an essential condition to the acquisition of an interest in the subject of the gift.

PROCEEDINGS upon the final judicial settlement of the accounts of executors.

Frederick L. Drescher, for executors.

Milo J. White, for Olive N. Vander Roest and others.

Charles A. Dryer, special guardian.

SAWYER, S. William G. Vander Roest died on the 24th day of April, 1912, leaving a last will and testa-

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ment, which was executed on the 11th day of September, 1906. At the time of the execution of the will decedent had five sons and two daughters living. At the time of the death of the testator all of said children were living, except the son Charles, who died on the 2d of April, 1912, leaving a widow, Susan E. Vander Roest, and a son, Howard, who is under fourteen years of age and who is represented in this proceeding by a special guardian.

The widow of the testator, Mary Vander Roest, departed this life on the 3d of October, 1915, having remained the widow of the testator up until the time of her death. Between the time of the death of the testator and the death of the widow, to wit, on the 30th of November, 1913, Peter Vander Roest, a son, died, leaving a widow, Olive N. Vander Roest, and two sons, Edward J. Vander Roest and Arnold A. Vander Roest, both of full age, and another son, George Vander Roest, who was a minor over the age of fourteen years, and who is represented by a special guardian herein.

The contention is made that under the second and third clauses of the will the children of the two deceased sons of the testator, Charles and Peter, are entitled to share in the distribution of the estate or fund set forth therein. The second and third clauses of the will to be construed are as follows:

"*Second.* I give, devise and bequeath all of my real estate, and wheresoever the same may be situate, to my executors hereinafter named or to such of them as shall qualify to act, in trust nevertheless, to receive the rents, income and profits and pay the net proceeds thereof to my beloved wife, Mary Vander Roest, during her natural life, or so long as she remains my widow, and I expressly declare that this gift to my wife, if accepted by her, shall be taken in lieu of dower, and after the death of my beloved wife Mary Vander

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Roest, or until such time as she shall cease to be my widow, the trust hereby created shall cease, and I order and direct my executors hereinafter named or such of them as may qualify to act to sell and dispose of all of my real estate, and wheresoever the same may be situate, and divide the net proceeds thereof and distribute the same equally among my surviving children, share and share alike for their and each of their sole benefit and behoof forever.

"*Third.* I give and bequeath to my executors hereinafter named or such of them as may qualify to act, all my personal property and wheresoever the same may be situate, in trust nevertheless, to keep invested and to invest the same in bonds secured by first mortgage on real estate, situate in the city known as Greater New York, or in guaranteed bonds secured by mortgages on real estate with the Title Guarantee and Trust Company, or with the Lawyers Title Company of the City of New York and pay the net proceeds and income thereof to my beloved wife Mary Vander Roest during her natural life, or so long as she shall remain my widow, and I expressly declare that this gift to my wife, if accepted by her, shall be taken in lieu of dower. After the death of my wife, or until such time as she may cease to be my widow, the trust in my personal property shall cease, and the same shall be distributed equally among my surviving children share and share alike."

The first thing to be ascertained is, what was the intention of the testator? *Cammann* v. *Bailey,* 210 N. Y. 19.

If his intention was that the gift to the children should not vest until the time set for the transfer or payment to them as beneficiaries, then the gift would be contingent and not vested.

In this case the devise and bequest is to the trustees.

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The entire residuary estate is given to the executors with direction to them, after the death of the life tenant, or in case of her remarriage, the trust having ceased, to divide the net proceeds and distribute the same equally among the surviving children share and share alike.

It seems to me that the intention of the testator is clear, to postpone the vesting of the estates until the death of the life tenant or until her remarriage. They, the children, were to take through the medium of a power in trust, and the time of the vesting was thus deferred, in form at least, until the time of distribution. It is a case then where, as the cases express it, futurity is annexed to the substance of the gift, and warrants the application of the principle that where a future interest is devised, not directly to a given person, but indirectly through the exercise of a power conferred upon trustees, the devise is designed to be contingent, and survivorship at the time of distribution is an essential condition to the acquisition of an interest in the subject of the gift. *Dickerson* v. *Sheehy*, 156 App. Div. 101–104; affd., 209 N. Y. 592; citing *Matter of Baer*, 147 id. 348.

The court in the same case (at p. 104) states as follows: "I am aware of the existence of a rule which favors the vesting of estates, but that rule is never applied when the intention of the testator, as gathered from the whole will, is that the estate should not vest; in other words, all of the rules laid down for the construction of wills yield to the actual intent of the testator if that can be ascertained from the will itself."

The general rule of construction applicable in a case of this character is that where there is no gift, but a direction to executors or trustees to pay or divide and to pay at a future time, the vesting in the beneficiary

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will not take place until the time arrives. *Matter of Keogh*, 47 Misc. Rep. 37–43; affd., 112 App. Div. 414; affd. by Court of Appeals, without opinion, 186 N. Y. 544.

Clearly the remainder here is contingent and not vested, and the only persons who are entitled to share in the distribution of the fund are the children of the testator who survived the life tenant, Mary Vander Roest.

Decreed accordingly.

Matter of the Intermediate Judicial Settlement of the Account of THOMAS J. KEANE et al., as Trustees under the Last Will and Testament of GEORGE A. FELD, Deceased.

(Surrogate's Court, Bronx County, April, 1916.)

Testamentary trustees — intermediate judicial settlement of account — executors and administrators — wills — accounting by trustees.

In a proceeding brought for the intermediate judicial settlement of the account of testamentary trustees, the testator's will left one-third of the residuary estate to trustees named in trust for the benefit of his widow for life with remainder to his surviving children and their lawful issue in equal shares and two-thirds thereof to the said trustees to invest and keep invested for the benefit of his children to be divided equally among them and their descendants on terms and conditions set forth in the will.

The accounts of the executors of the estate were judicially settled and the account filed by the trustees in this proceeding showed that they held on deposit with a corporation a balance of an indebtedness to the testator which was turned over to them by the executors of the estate now amounting to $100,347.60 and a balance of dividends declared of $1,314.92 and rent amounting to $1,000, both of which accrued since the executors accounted. Ten infants are beneficiaries under the

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will, either present or contingent. The special guardian representing them filed objections to the main items referred to above and also to the items with which the trustees have credited themselves on behalf of each of the beneficiaries and thereby put in issue the right of the trustees to leave these amounts referred to on deposit with the said corporation as an investment of trust funds. The adult beneficiaries consent that the said amounts remain invested as stated by the trustees in their account.

The eighth paragraph of the will empowered the trustees to invest the trust funds in such manner as they in their unrestricted discretion should deem best without being limited to such forms of investment as are authorized by law for the investment of trust funds, and the fourth paragraph provided that during the minority of any beneficiary the trustees might in their discretion accumulate the income from the share of such beneficiary or use the whole or any part thereof for his benefit at any time during his minority.

The estate owned eighty per cent of the stock of the corporation and all of the trustees were directors, one was the president and two of them were stockholders of the said corporation with which the items in question are deposited and which used them as a part of its working capital.

In sustaining objections filed by the special guardian,

Held, (1) That the issues in this proceeding were not adjudicated in the judicial settlement of the executors' accounts;

(2) That any accumulated income in the hands of the trustees might be invested by them in the same manner and on the same securities upon which they are authorized to invest the principal;

(3) That the trustees cannot treat the amounts referred to as legal investments in the absence of special authority conferred upon them by the testator in his will; that the creator of a trust may prescribe how the investments shall be made and on what security; and that the courts have always looked with disfavor upon the investment of trust funds in enterprises where the interests of the trustees as individuals may come in conflict with their interests in the fiduciary relation;

(4) That the fact that the testator allowed moneys due him for balances of unpaid profits to remain in the treasury of the corporation as a part of its working capital, does not of itself justify an exercise of discretion by the trustees which would continue the same as an investment; that if under the powers given them it would have been improper to invest the trust

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funds by loaning them to the corporation to be used as a part of its working capital, it would be equally improper to treat such a loan already made as an investment of trust funds and continue it as such; that it was not a proper exercise of discretion by the trustees under all the circumstances of this matter to treat the amounts mentioned above as investments of trust funds.

(5) That there is no rigid or arbitrary standard by which to measure the reasonable time within which the trustees were obliged to insist upon a payment of the amount of $100,347.60; that what is a reasonable time must depend upon the circumtances of each particular case; that the test is whether the trustees have used that diligence and prudence in converting the debt into cash which careful and intelligent men would have used in the management of their own affairs.

(6) That a construction will not be favored which would make it incumbent upon the trustees to withdraw immediately from the working capital of the corporation the large amount of money which the testator had left with it; that such an intention cannot with reason be imputed to him for the reason that it could not have been his wish to imperil the corporation in which he was so largely interested by so drastic an exercise of power by the trustees; and that it was the testator's intention to leave it to the discretion of his trustees as to the time when and the manner in which this debt should be collected.

(7) That the trustees should be charged with the said item of $100,347.60, not as cash, but as a debt due from the corporation to them as trustees, and be surcharged with so much of the said items of $1,314.92 and $1,000 as they have deposited with or loaned to the corporation as trustees for infant beneficiaries.

(8) That the adult beneficiaries of the various trust funds by their consents are estopped from questioning the propriety of leaving the last mentioned items of dividends and rent on deposit with the corporation as an investment, and in case they should as provided by the will become entitled to a part of the item of $100,347.60 they are estopped from questioning the form of investment thereof as stated by the trustees.

PROCEEDINGS on the intermediate judicial settlement of the account of trustees.

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William A. Montross, for petitioner.

Maurice S. Cohen, special guardian for infants, respondents.

SCHULZ, S. This is a proceeding brought for the intermediate judicial settlement of the account of the trustees under the last will and testament of the decedent.

The latter left him surviving a widow, two daughters, three sons and seven grandchildren.

By the fourth paragraph of his will he leaves all the rest, residue and remainder of his estate to the trustees therein named, who are the accountants in this proceeding, with the proviso that one-third thereof shall be invested for the benefit of his widow during the term of her natural life, giving to the trustees the authority at their discretion at any time during her life to pay over, transfer and convey the whole or any part of the principal and corpus to her free from the trust. Upon her death they are to convey the principal and corpus of said one-third, or so much thereof as may then remain, to his children then surviving and to the lawful issue then surviving of any of his children who shall have died, in equal shares *per stirpes* and not *per capita*, the shares of such as may be under twenty-one years of age to be retained by the trustees who shall continue to hold the same in trust until the minors shall respectively have reached the age of twenty-one years. He also gave the trustees authority in their discretion during the minority of such infants to transfer and convey to the beneficiaries the whole or any part of the income or principal of such share and provided for the disposition of the latter in case of the death of such infant beneficiary during his or her minority. The remaining two-thirds of his residuary estate he

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directed should be divided into as many shares as shall equal the number of his children him surviving, together with the number of children that have predeceased him leaving issue surviving, each part representing a child who shall have died to be equally divided *per stirpes* and not *per capita.*

This two-thirds part he also gave and bequeathed to the trustees to invest and keep invested the parts or shares thereof in such wise that it would be divided equally among his children and descendants *per stirpes* and not *per capita.* The proceeds of each share he directed to be paid over to the beneficiaries of the share with the right in the discretion of the trustees to pay over, transfer or convey the whole or any part of the principal or corpus of the share of such beneficiary to him or her free from the trust. He gave the beneficiaries of the trust last mentioned a power of appointment by will and in default of its exercise directed that so much of the principal or corpus of the estate as remained should be paid to the heirs and next of kin of such beneficiaries.

The decedent owned eighty per cent of the capital stock of the corporation known as George A. Feld Company, which had an authorized capital stock outstanding of $25,000. The nature of the business conducted by the corporation does not appear from the papers before me. He also owned the building in which the said George A. Feld Company carried on its business. At the time of the death of the testator the corporation was indebted to him in the sum of $145,450.22, representing a balance for compensation and profits accrued which the decedent had not withdrawn from the corporation, but had permitted to remain in the treasury as a part of the working capital and which was credited to him on the books of the corporation and was, in form, a debt of the corporation. This amount has been

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reduced since his death to the sum of $100,347.60 by payments made by the corporation to the estate and the latter amount is stated to be on deposit with the corporation "as an investment." A balance of dividends declared since the death of the testator in the sum of $1,314.92 and rent amounting to $1,000 since accrued are stated to have been received by the accountants and left on deposit with the corporation.

The trustees have credited themselves with the sum of $100,347.60, above stated as being an investment of trust funds. They have then assigned and credited to themselves in trust for each of the beneficiaries a part of this alleged investment. The same procedure was adopted by the trustees with reference to the balance of dividend and the rent above referred to.

Among the children and grandchildren who are beneficiaries under the trust, either present or contingent, are ten infants represented in this proceeding by a special guardian. The special guardian has filed objections to the main items referred to above, and also to the items with which the trustees have credited themselves on behalf of each of the beneficiaries, the legal effect of which is to put in issue the right of the trustees to leave these various amounts on deposit with or due from the corporation and to credit themselves therewith as investments of the trust funds, and also their right to credit themselves, as trustees for the various beneficiaries, with proportionate parts thereof. In other words, the question is raised whether, under the language of the will defining the powers of the trustees, the latter can regard the indebtedness from the corporation to the testator existing at the time of the latter's death and the balance of dividends and the rent which accrued since his death and which latter two items they received and left on deposit with the corporation, as investments of the trust funds.

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All of the adults interested in the trusts are satisfied with the procedure adopted by the trustees and urge that the account be approved as filed.

The accountants contend that as to the objection to the item of $100,347.60, heretofore referred to, and this would no doubt apply to the objections made to the proportionate amounts heretofore assigned by the trustees to themselves as trustees for the beneficiaries, the issue raised is *res adjudicata* because the executors in their account filed about one year ago claimed credit for an item of $102,162.52, of which the first mentioned sum was a part, which consisted of the indebtedness named, which they had turned over in kind to the trustees and which they stated was to be left by the said trustees on deposit with the company as an investment and for the purpose of furnishing the company with necessary capital. No objections were interposed to this account by any of the parties thereto, although all the parties now before the court were parties to that proceeding and a decree settling the account as filed was made.

I am satisfied, however, and hold that the issues before me have not been adjudicated in the accounting proceeding referred to. *Matter of Bannin*, 142 App. Div. 436, seems to me to be conclusive on that proposition. In that matter the executors had accounted, as such, and all persons having an interest either as life tenants or remaindermen in the estate had been duly cited. The accounts had been passed without objection and the executors had turned over the estate to themselves as trustees. They had thereafter, as trustees, had four prior accountings. It appeared that in the first accounting by the trustees there had appeared an item showing that the deceased had an interest in a firm of which no settlement had been made. In the third accounting this interest was again

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set forth with the statement that no settlement had been made with the surviving partner. The court, in considering the question of *res adjudicata*, said (p. 442): "We think, where no objections were interposed and no specific ruling had thereon by the court, and the decree upon the accounting merely approved the accounts as rendered and fixed the amounts in the hands of the trustees, that this, while sufficient to bar inquiry as to past transactions, was not such an approval of the mode of investment as to preclude the court upon a subsequent accounting from disapproving of the continued contribution to the capital of a going concern * * *. As it does not appear that this matter was specifically passed upon on the former accountings, as no attempt is made to charge the trustees with any funds distributed or paid out by them which had been approved upon the former accounting, as the fund remains in their hands and under their control, and as, even if there was an approval of the original transaction, the membership and capital of the copartnership has materially changed since the last accounting, we discover no bar to the present consideration of the question whether this trust fund should remain subject to the hazards of the general partnership in a mercantile concern." See, also, *Matter of Hoyt*, 160 N. Y. 607; *Matter of Elting*, 93 App. Div. 516; *Bowditch* v. *Ayrault*, 138 N. Y. 222; *Matter of Leask*, 159 App. Div. 102.

It, therefore, becomes necessary to examine the provisions of the will which define the powers of the trustees. By the eighth paragraph the testator provided as follows: "I authorize and empower my said Trustees and their successors and the survivors and survivor of them to invest said trust funds in such manner as they or he in their or his unrestricted discretion shall deem best, without being limited to such forms

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of investment as are authorized by law for the investment of trust funds. And in case any part of such trust funds shall at any time be invested in bonds or other securities payable at a fixed or determinable date, the value of which shall be more than par, I direct that the whole of the interest and other income therefrom be paid to the beneficiary, without making any deduction therefrom for the preservation of the principal."

The trust provision with regard to the two-thirds of the residuary estate hereinbefore referred to provides for the collection of the rents, issues, income, etc., of each share and the payment of the same over semi-annually or oftener to the beneficiary of said share and then follows this provision: "Except that during the minority of any beneficiary my said Trustees or their successors or the survivors or survivor of them may in their discretion accumulate the income from said share, or may pay over to, or use for the benefit of, such beneficiary, at any time or times during his or her minority, the whole or any part of such income, the accumulations of income, if any, to be paid over to such beneficiary upon his or her reaching the age of twenty-one years." Under this provision, I am of the opinion that any income which has accumulated in the hands of the trustees as indicated may be invested by them in the same manner and on the same securities upon which they were authorized to invest the principal. *Matter of Stewart*, 30 App. Div. 368; affd. on opinion below, 163 N. Y. 593. Hence, if it is proper for the trustees to permit the amount which was due to the testator to remain on deposit with, or as a loan to, the corporation under the powers with which they were vested by the will, it was also proper for them to leave the shares of the income, namely, of the item of balance of dividend, $1,314.92, and the item of $1,000 for rent, to remain on deposit in the same way.

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That the trustees could not treat the amounts referred to as legal investments in the absence of special authority conferred upon them by the testator there can no longer be any doubt in this state. Underhill Wills, § 790; Thomas, Law of Estates, 741 *et seq.;* Perry Trusts, §§ 452, 456; *King* v. *Talbot*, 40 N. Y. 76; *Matter of Wotton,* 59 App. Div. 584; affd., no opinion, 167 N. Y. 629; *Toronto Gen. Trust Co.* v. *Chicago, B. & Q. R. R. Co.,* 64 Hun, 1, 9; affd. on opinion below, 138 N. Y. 657; *Matter of Avery,* 45 Misc. Rep. 529, 549; Decedent Estate Law, § 111, being Laws of 1909, chap. 18, and constituting Consol. Laws, chap. 13; Pers. Prop. Law, § 21, being Laws of 1909, chap. 45, and constituting Consol. Laws, chap. 41; Banking Law, §§ 239, 239-a, being Laws of 1914, chap. 369, as amended by Laws of 1915, chap. 269, and constituting Consol. Laws, chap. 2. And it is equally well settled that the creator of a trust may prescribe how the investments shall be made and what security shall be taken for moneys invested. *Denike* v. *Harris,* 84 N. Y. 89; *Thorn* v. *De Breteuil,* 86 App. Div. 405, 424; modified, 179 N. Y. 64; *Matter of Stewart, supra.*

It is first to be determined, therefore, whether they were given the authority to invest in other than the usual securities. As to this the language of the paragraph of the will quoted above leaves no doubt in my mind. *Matter of Hall,* 164 N. Y. 196; *Matter of vom Saal,* 82 Misc. Rep. 531; *Matter of Keteltas,* 1 Conn. 468; *Lawton* v. *Lawton,* 35 App. Div. 389.

But notwithstanding the fact that the trustees have the authority stated and however large the discretion in them may be, the court nevertheless does not lose its power to review the use of this discretion and, if need be, to correct any abuse in its exercise. In *Matter of Hall, supra,* the language of the will was as follows: "I hereby give my said executors and trustees here-

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inbefore named full power to reinvest * * * in any security real or personal which they may deem for the benefit of my estate and calculated to carry out the intention of this my last will."

Here the testator had been in the business of manufacturing umbrellas, and by his will he directed that his interest in the business be closed on the first day of January or the first day of July immediately following his decease. The executors invested in the stock of a corporation in the same line of business. The Court of Appeals, in discussing the power granted to the trustees and their exercise of it in the manner indicated, said: "We concede that under the terms of the will the trustees were given a discretion as to the character of the investments they might make, and that they were not limited to the investments required by a court of equity in the absence of any directions from a testator. The trusts of this will are to provide the testator's children with income during their lives, and on their deaths the principal is to go to their issue. The very object of the creation of the trust, was, therefore, the security of the principal, otherwise the testator might better have given the property outright to his children who were the primary objects of his bounty;" and then disapproved of the investment made.

In *Matter of vom Saal, supra*, the will contained a provision very much similar to the one under consideration, empowering the executors "to *invest and reinvest* the proceeds, in such amounts and in such manner as may to them in their absolute discretion seem advisable, although the said investments may not be of the character permitted for the investment of trust funds by the ordinary rules of law." And the learned surrogate said: "It seems to me that a proper construction of the clause under consideration permits the

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executors to invest the trust fund in securities other than so-called court securities, or those mentioned in section 111 of the Decedent Estate Law, using such diligence and such prudence in the care and management of the trust funds as prudent men of discretion and intelligence in such matters employ in their own like business concerns. If the executors and trustees in their discretion do not invest the funds in such securities as are mentioned in said section 111, known generally as court securities, in case of the depreciation of the investments their conduct as to good faith, diligence and prudence may be inquired into on a settlement of their accounts. If, in the investment of the funds, they should take securities which diligent and prudent men, acting in good faith, would not take, they would be held liable for the loss, but if they should act with the good faith, prudence and diligence which would characterize a good, careful business man under the circumstances in the investment of funds, they would not be held liable, although there might be a loss." See, also, *Clark* v. *Clark*, 23 Misc. Rep. 272, 286, and cases cited; *Matter of Hirsch, No. 1,* 116 App. Div. 367; affd. without opinion, 188 N. Y. 584.

In the pending matter it appears that all of the trustees are directors, one of them is the president and two of them are stockholders of the corporation with which the items in question are deposited and which uses them as a part of its working capital. Without in the slightest degree impugning the good faith of trustees, or even inquiring into it, the courts have always looked with disfavor upon the investment of trust funds in enterprises where the interests of the trustees as individuals may come in conflict with their interests in the fiduciary relation. *Deobold* v. *Oppermann,* 111 N. Y. 531; *Matter of Hirsch, No. 1, supra; Matter of Stallo,* 82 Misc. Rep. 135; *Pyle* v. *Pyle,* 137

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App. Div. 568; affd. without opinion, 199 N. Y. 538; *Munson* v. *Syracuse, G. & C. R. R. Co.*, 103 N. Y. 59.

Nor does the fact that the testator allowed the moneys due him for balances of unpaid profit to remain in the treasury of the corporation as a part of the working capital, of itself justify the exercise of the discretion of the trustees in continuing the same as an investment. If under the will and the power given them as trustees it would have been an improper exercise of discretion to invest trust funds by loaning them to the corporation to be used by it as part of the working capital, then it is an equally improper exercise of such discretion to treat such a loan already made as an investment of trust funds and continue it as such. Perry Trusts, §§ 454, 465; *Matter of New York Life Ins. & Tr. Co.*, 86 App. Div. 247; *Toronto Gen. Trust Co.* v. *Chicago, B. & Q. R. R. Co., supra.*

In my opinion it is not a proper exercise of discretion on the part of the trustees under all the circumstances, to treat the amount due to the testator at the time of his death and the balance of dividends and rent due, as investments of the trust funds. It follows that the objections of the special guardian must be sustained.

Assuming that my conclusions as stated are correct, the next question presented is whether the trustees should be charged with the items stated as cash. I consider first the item of $100,347.60, being the balance of the amount which was due from the corporation to the decedent at the time of his death. There is no rigid or arbitrary standard by which to measure the reasonable time within which the trustees in this matter were obliged to insist upon a payment of this amount. What is a reasonable time must depend upon the circumstances in each particular case, and what would be a reasonable time in one instance would not

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necessarily be so in another. The test is whether the trustees have used that diligence and prudence in converting the debt into cash which careful and intelligent men would have used in the management of their own affairs. Thomas, Law of Estates, p. 744; Perry on Trusts, § 465; *Matter of Weston,* 91 N. Y. 502; *Matter of Hosford,* 27 App. Div. 427, 430; *Matter of Wotton, supra.*

Considering all of the circumstances in the matter before me, I am not prepared to hold that it was the duty of the trustees to insist upon the payment of this item as soon as it came into their hands, or since that time and up to the present. The decedent owned eighty per cent of all the capital stock of the corporation which was indebted to him, and I cannot favor a construction which would have made it incumbent upon the trustees to withdraw immediately from the working capital of this corporation the large amount of money which the decedent had left with it. Such an intention cannot with reason be imputed to the testator, for I cannot believe that it was his wish possibly to imperil the corporation in which he was so largely interested by such a drastic exercise of power by the trustees. The latter were associated with the decedent in business. He must be presumed to have known them well. The whole will and the powers intrusted to them by the testator showed that he had absolute confidence not only in their honor as men, but in their sagacity as business men. He not only made them trustees with power to distribute the income, but he gave them the right in their discretion to pay over the principal; a clear indication of the implicit trust that he had in their honesty and in their discretion. I am of the opinion that it was the testator's intention to leave it to the discretion of his trustees as to the time when and the manner in which this debt should be collected, relying upon their good judgment to see to it

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that it should not be done in such a way as to hurt the business of the corporation in which he was so largely interested.

I hold that the trustees should be charged with the said item, not as cash, but as a debt due from the corporation to them as trustees.

As trustees it was and is their duty to collect this amount in such a manner and at such a time or times as this can be done without imperilling or unduly embarassing the corporation. The latter seems to be in a flourishing condition, and if the trustees have used and do use reasonable and proper discretion and diligence in the matter which, judging from the confidence that the testator had in them, it is likely they will do, they cannot be justly criticised, even if a loss results.

As to the item of $1,314.92 balance of dividends and that of $1,000 rent which was stated in the account to have been collected and deposited with the corporation as an investment, having reached the conclusion stated, the trustees will be surcharged with so much thereof as they have deposited with or loaned to the corporation as trustees for infant beneficiaries.

Such beneficiaries of the various trust funds as are of full age who have consented to the trustees leaving the items last referred to on deposit with the corporation as an investment are estopped from questioning its propriety. These adult beneficiaries may, in the discretion of the trustees, become entitled to share in the principal. In case any of such beneficiaries should thus become entitled to a part of the item of $100,347.60, they are estopped from questioning the investment thereof as stated by the trustees by reason of their consent thereto and acquiescence therein. *Matter of Hall, supra.*

Decreed accordingly.

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Matter of the Judicial Settlement of the Account of Proceedings of WILLIAM H. VAN KLEECK, as Trustee under the Last Will and Testament of JAMES D. INGERSOLL, Deceased (MARIA C. LEEDS TRUST).

(Surrogate's Court, New York County, April, 1916.)

Trustees — gift to executors in trust — when title vested in representatives — provisions of decree on judicial settlement of accounts.

A gift to executors in trust for a certain person, the income to be handed to her and at her decease the principal to "go to" her daughter who was living at the time the will took effect, is a vested remainder, and upon the death of the remainderman title vested in her representatives, and there being no unpaid debts and no ancillary representative in this jurisdiction, all parties being before the court, the decree upon the judicial settlement of the account of the proceedings of the testamentary trustee should provide for payment to those entitled directly.

PROCEEDINGS upon the judicial settlement of the account of a trustee.

Wilson H. Powell, for petitioner.

Beekman, Menken & Griscom (S. Stanwood Menken and Ralph S. Wolcott, of counsel), for respondents Charles E. Brown, Harold W. Brown and Charles E. Brown, Jr.

Scott, Newcomb & McLoughlin (Francis J. McLoughlin, of counsel), for Russell D. Leeds, Shepherd E. Leeds and John K. Leeds.

George A. Hoffman (Adolphus T. Sieker, of counsel), for L. Russell Leeds and George W. Leeds, residuary legatees.

James H. Hickey, for Grace Nesmith Prentice.

FOWLER, S. In this proceeding for the judicial settlement of the accounts of the trustee of James D.

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Ingersoll it becomes necessary to construe the 2d paragraph of the will of Mr. Ingersoll, which is as follows: "*Second.* I give and bequeath unto my executors and their survivors in trust five thousand ($5,000) dollars, to be by them safely invested, and the income of the same to be handed to Mrs. Daniel W. Leeds, wife of Daniel W. Leeds, and at her decease the principal to go to her daughter." The surrogate must determine whether the remainder interest bequeathed under the 2d paragraph of the testator's will is a vested or a contingent interest.

Mrs. Leeds had only one daughter, Julia P. Brown, who predeceased her mother. The residuary legatees under the will claim that the interest bequeathed to Julia P. Brown was contingent, and that upon her predeceasing her mother, Mrs. Leeds, it passed to the residuary legatees. It appears that Julia P. Brown died intestate in 1887, a resident of the state of New Jersey, leaving her surviving her husband, Charles E. Brown, and two sons, Harold W. Brown and Charles E. Brown, Jr. The husband and children of Julia P. Brown claim that the remainder was vested in Julia P. Brown, and that on her demise the title to the $5,000 legacy devolved under the laws of the state of New Jersey upon her surviving husband.

The residuary legatees, on the other hand, invoke the rule that where a devise or bequest is made through a power in trust, or solely through a direction to pay or convey at a future time, it is contingent. This rule I regard as a settled rule of construction, and yet it has recently been considered by the Court of Appeals in *Cammann* v. *Bailey*, 210 N. Y. 19, and *Dickerson* v. *Sheehy*, 209 id. 592, in such a way as to occasion an expression of doubt whether or not the rule was a settled principle of construction applicable in all instances. In *Fulton Trust Co.* v. *Phillips*, 164 App. Div. 498, 505,

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Mr. Justice Ingraham concluded as follows: "With much diffidence and a confession of my inability to deduce from the authorities any rule that can aid in the construction of a will presenting these features I can only say that endeavoring to the very best of my ability to follow the directions of the Court of Appeals it seems to me that we are required to hold that in this case it was the intention of the testatrix that * * * the estate vested." After a careful investigation of the decisions Justice Ingraham was obviously unable to state with any degree of confidence when the rule applied to a particular case. It is thus apparent that while the rule is well recognized by the courts of this state, the judicial desire to construe estates as vested rather than as contingent has led the courts to subordinate a rule of property to a construction dependent upon the ascertained intention of the testator. *Steinway* v. *Steinway*, 163 N. Y. 183. As Chief Judge Cullen well said in substance in *Cammann* v. *Bailey*, one of the effects of the uncertain application of the rule is that in each instance counsel is justified in insisting, if not actually required to insist, that his client should obtain the decision of the court of last resort upon the construction of an interest devised and bequeathed in a direction to convey or divide. But whatever doubts the judiciary may feel in the application of settled principles to concrete cases, they have no place in so plain a case as this.

The three decisions just referred to all recognize the rule indicated as an existing rule of construction. A rule cannot be doubtful and remain a rule. Consequently if the remainder interest in this case is bequeathed solely in a direction to convey or divide, it is undoubtedly incumbent upon the surrogate to decide in conformity with the rule that such interest is contingent. But having in mind another paramount and

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influential rule of courts of construction, that an estate must be construed as vested and not as contingent whenever possible, and also the manifest reluctance of our appellate courts to invoke the rule which makes an estate contingent, when transferred by a power in trust, I am nevertheless of the opinion that the true construction of the language of the 2d paragraph of the will makes the remainder, now under consideration, a vested remainder. It will be observed that the testator did not direct that upon the death of Mrs. Leeds the trustee was to pay over the principal to the daughter; the will in substance only provides that the executors should hold the $5,000 in trust, and during the life of Mrs. Leeds pay over to her the income, and that upon the death of Mrs. Leeds the principal should "go to" her daughter. There is here no express direction that the remainder interest should be paid to the daughter by the trustee or through the interposition of a power in trust reposed in the executors. There is evident no such trust or power in trust. The trustee was by the will given the title to the $5,000 only in order that he might hold the same in trust for the life of the beneficiary. When the trust ceased the estate or title of the trustee ceased *ipso facto*. The testator himself, in fact, disposed of the remainder when he created the trust. When the trust ceased he provided that possession of the principal, or remainder interest, was "to go to her daughter." Obviously the rule laid down in *Cammann* v. *Bailey* and *Dickerson* v. *Sheehy, supra,* has no application where there are words of direct gift. In this case the words "principal to go to her daughter" are in effect words of direct and immediate gift. It is the same as if the testator had said "upon the decease of Mrs. Leeds I give the principal to her daughter." Indeed, it has recently been held that the words "shall pass to"

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are words of direct gift. *Whitwell* v. *Whitwell,* 146 App. Div. 270, 272. I deem the word "to go to her daughter" more expressive of an immediate gift than the words "shall pass to." The words in the will now here to my mind clearly indicate ownership of the remainder *in praesenti,* not *in futuro.* The words "to pass to" are susceptible of a future operation; they possibly indicate a transition or suspension of title, whereas the words "to go to" readily imply only a present and direct gift.

Therefore I conclude that the language of the will is sufficient to indicate an intention that the trustee should hold the legal title to the $5,000 fund during the lifetime of Mrs. Leeds, meanwhile paying to her the income, but that her daughter should have the remainder interest, *eo instanti,* but to take effect in possession upon the termination of the preceding life estate. It is as if the testator had stated that he gave $5,000 to "A" for life, and at her decease the sum of money was to belong to her daughter. In that case it would be too clear for argument that the remainder interest was vested. It is immaterial that in this case the present estate, upon which the remainder interest is limited, is bequeathed in trust. The trustee takes only an estate sufficient to enable him to execute the trust. Real Prop. Law, §§ 100, 101, which are made applicable to an estate in personal property by Pers. Prop. Law, § 11; *Losey* v. *Stanley,* 147 N. Y. 560; *Matter of United States Trust Co.,* 78 Misc. Rep. 227, 235. The interposition of a trust estate never prevents the vesting of a remainder interest. *Embury* v. *Sheldon,* 68 N. Y. 227; *Doscher* v. *Wyckoff,* 132 App. Div. 139.

This will before me requires the application of the principle that words such as "on," "when," "after," "from and after," etc., and similar expres-

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sions used in a devise of a remainder following a life estate are not of themselves sufficient to justify a conclusion that a remainder is contingent and not vested. *Trowbridge* v. *Coss,* 126 App. Div. 679; affd., 195 N. Y. 596; *Connelly* v. *O'Brien,* 166 id. 408. This case resembles *Matter of United States Trust Company, supra.* For the reasons there pointed out I think the interest of Julia P. Brown must be taken to be vested.

This conclusion necessitates an examination of a rather nice question, whether, upon the death of Julia P. Brown in 1887, title to her legacy vested in her legal representatives, and whether or not the decree in this proceeding should direct its payment to her surviving husband or children. The latter are all represented in this proceeding by the same attorneys, and urge that the decree direct payment to the husband, Charles E. Brown, on the ground that under the law of New Jersey in force in 1887 the latter became entitled as sole owner. It does not appear in this proceeding that an ancillary representative has been appointed in this jurisdiction, nor does it affirmatively appear that there are any unpaid debts of the estate of Julia P. Brown. Under such circumstances the legacy may be paid without the intervention of an ancillary administration. *Sultan of Turkey* v. *Tiryakian,* 162 App. Div. 613; affd., 213 N. Y. 429; *Matter of Mercure,* 1 Tuck. 288. Furthermore, the title to the legacy belongs to the person beneficially entitled without the intervention of any administration in the domicile. *Blood* v. *Kane,* 130 N. Y. 514; *Barlow* v. *Myers,* 24 Hun, 286; *Matter of Nash,* 159 App. Div. 46; *Smith* v. *Webb,* 1 Barb. 230; *Matter of Mullon,* 145 N. Y. 98.

Title to property of a decedent vests at once in a sole legatee or distributee where the debts of the

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estate have been paid without the intervention of an executor or administrator. It has been said that this is so only where there are special circumstances, as, for example, where the right or title has been admitted and an estoppel has taken place. *Segelken* v. *Meyer,* 94 N. Y. 473. But in that case title was asserted in behalf of one who was not the sole distributee. In *Blood* v. *Kane, supra,* the legatee claiming title without letters testamentary was the sole legatee. Whatever qualifying circumstances must exist, when one of several legatees or distributees asserts title derived from a decedent, a sole legatee or distributee may assert his title irrespective of the special circumstances referred to in *Segelken* v. *Meyer, supra,* and the cases therein cited. There is a presumption that there are no debts in the absence of affirmative proof of their existence (*Sultan of Turkey* v. *Tiryakian, supra*), and therefore a sole beneficiary has a complete title. In *Wooden* v. *Bayley,* 13 Wend. 453, which might appear to read to the contrary, the presumption of the existence of no debts was rebutted by proof of the insolvency of the decedent. In *Lounsbury* v. *Depew,* 28 Barb. 47, decedent's debts had not been paid. *Schultz* v. *Cookingham,* 30 Hun, 443, was an action by only one of several next of kin, as were likewise *Palmer* v. *Green,* 63 Hun, 6, and *Nichols* v. *Smith,* 164 App. Div. 304, 310. *Matter of Mullon, supra,* sustains and approves the rule that a sole legatee becomes entitled to the assets of the decedent when all the debts have been paid.

In the recent decision of *Hart* v. *Goadby,* 138 App. Div. 160, while the plaintiffs were the principal legatees they were not entitled to the entire estate of the decedent to the exclusion of the other legatees, and furthermore, the complaint contained no allegation of fact that the debts had been paid. *Bushe* v. *Wright,* 118 App. Div. 320; aff'd., 195 N. Y. 509, apparently was

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not a case in which a sole legatee or devisee asserted title coming through a decedent's estate, and moreover, the case involved a construction of former section 2606 of the Code of Civil Procedure.

In this case, upon the death of Julia P. Brown, if we apply the law of the state of New York then in force, the title vested in her husband. R. S. pt. II, chap. 6, title 3, § 79, which in effect re-enacted 29 Car. II, chap. 3, § 25; *McCosker* v. *Golden,* 1 Bradf. 64.

While the law of the place of domicile must be applied upon all questions of the devolution of personalty (*Matter of Hughes,* 95 N. Y. 55, and *Despard* v. *Churchill,* 53 id. 192), in the absence of proof of the law of New Jersey the common law in force in this state will be applied. *Monroe* v. *Douglass,* 5 N. Y. 546; *Latham* v. *De Loiselle,* 3 App. Div. 525; affd., 158 N. Y. 687. This presumption is applied in administering the estate of a non-resident decedent, as well as in determining other issues of civil litigations. In *Matter of Hughes, supra,* the presumption was followed. As was above stated, the husband and sons of Julia P. Brown appear by the same attorneys and acquiesce in a direction for the payment of her legacy to the husband. However, the accounting trustee is entitled to have the payment directed to the one having legal title, and it is for this reason that the question has been discussed. The surrogate has jurisdiction upon this accounting to determine the legal title to the distributive share bequeathed to Julia P. Brown. *Matter of Kent,* 92 Misc. Rep. 113, and cases cited.

The decree should provide that upon the death of Julia P. Brown the legacy referred to in paragraph 2 of the will of decedent passed to Charles E. Brown, her husband, and that the trust fund should be paid to him.

Decreed accordingly.

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Matter of the Application to Construe the Last Will and Testament of CHARLES FREDERICK FOWLES, Late of the County of New York, Deceased.

(Surrogate's Court, New York County, April, 1916.)

Wills — construction of — execution of — when extrinsic evidence admissible — when lapse avoided.

In the absence of proof of actual survivorship there is at common law no presumption of survivorship or simultaneous death where persons perish in a common disaster.

Extrinsic evidence is inadmissible in the construction of wills except in three specific instances: (1) latent ambiguity; (2) to rebut a resulting trust, and (3) a patent ambiguity susceptible of resolution thereby.

Extrinsic evidence of the circumstances surrounding a testator at the time of the execution of his will is inadmissible where the instrument is clear and free from equivocation.

A testator's direction to a court to reverse a rule of law is contrary to public order.

Where a will is susceptible of two constructions that which validates it will be preferred.

Lapse will be avoided by construing a bequest as substitutional whenever possible in the instance of commorientes.

A direction in a will considered and held to have been intended to avoid a lapse and substitutional.

PROCEEDING for construction of a will, pursuant to chapter 18 of the Code of Civil Procedure.

James W. Prendergast, for petitioner Stevenson Scott.

Duer, Strong & Whitehead (Selden Bacon and Henry S. Bacon, of counsel), for respondent Dorothy Elizabeth Smith.

R. N. Baylis, for respondents Gertrude Frances Browne and Gladys Mary Baylies.

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Charles H. Beckett, for Columbia Trust Company.

Egerton L. Winthrop, Jr., special guardian for Kenneth Charles Smith.

A. Perry Osborn, special guardian for other infants.

FOWLER, S. This proceeding is instituted, pursuant to chapter 18 of the Code of Civil Procedure now in force, for a construction of the will of Charles Frederick Fowles, deceased. The facts stated in the petition, promoted and filed by Mr. Fowles' executor, are not controverted, and are, therefore, for present purposes, to be taken as true. The various answers of the parties respondent do not raise issues of fact, but content themselves with recitals of the legal positions or claims of the respective respondents.

On the hearing Mr. Prendergast, the counsel who drafted the will of Mr. Fowles, and also the simultaneous will of his wife, was called to the stand without objection, and without objection or exception was permitted to testify. His testimony was, however, inconsequential, as it did not go beyond presumptions which the law itself draws from Mr. Fowles' will and coverture. Whether, as an abstract question, the testimony of Mr. Prendergast is entitled to be taken into consideration by the surrogate in this proceeding I must hereafter consider, as the range of extrinsic evidence permissible in proceedings of this character is very limited, and illegal evidence, even if offered without objection or exception, cannot be considered by the surrogate in matters of construction. The Statute of Wills requiring wills to be in writing permits no other evidence of their intention, purport or effect, except in certain well-defined and special instances. I am very much opposed to innovations

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on this established principle in courts of construction, and for this reason shall not pass the testimony over without giving it further consideration.

It appears that the testator died on the 7th of May, 1915, while a passenger on board the transatlantic steamer *Lusitania,* which was sunk on that day in the Atlantic ocean off the coast of Ireland. His wife, who accompanied him on the voyage, lost her life in the same disaster. No evidence whatever has been submitted to show that testator survived his wife or that she survived him. The draftsman of Mr. Fowles' will testified that two days before the testator and his wife sailed on the *Lusitania* they called at his office and each of them made and executed a will. The several wills are set out *in extenso* in the petition. The testator, in the presence of his wife, gave instructions to the attorney as to the manner in which he wished to dispose of his property, and his wife gave similar instructions in the presence of the testator. At the time the respective wills of the testator and his wife were being prepared, it appears that they discussed with their attorney the danger incident to sailing on the *Lusitania,* under the unusual international conditions existing at that time, and the risk which transatlantic voyagers then incurred. As a result of that discussion the will then prepared and executed by the testator contained the following paragraph: "*Ninth.* In the event that my said wife and myself should die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other, I hereby declare it to be my will that it shall be deemed that I shall have predeceased my said wife, and that this my will and any and all its provisions shall be construed on the assumption and basis that I shall have predeceased my said wife." The legal effect of this paragraph and the disposition

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to be made of the forty-five per cent of the residuary estate given to his wife in the 8th paragraph of the will are the main questions presented to the surrogate for determination. The estate is large and the questions raised are important.

I shall consider *in limine* the legal effect of the testimony of the counsel drafting the several wills. It would seem neither to add nor detract anything from the text of the will, but in a matter of this importance I cannot forbear to point out that extrinsic evidence is never admissible in our courts of construction except (1) where there is a latent ambiguity, arising *dehors* the will, as to the person or subject meant to be described; or (2) to rebut a resulting trust (*Mann* v. *Mann,* 1 Johns. Ch. 231, 234); (3) if a patent ambiguity may be obviated by extrinsic evidence it is now admitted by the best authority to afford a third exception to the rule excluding such extrinsic evidence. The only patent ambiguity which may not be so explained is one incapable of resolution. Hawkins Wills, 8; Phillips Ev. (ed. 1852) 391; Thayer's Prelim. Treatise Ev. 422, 473, 599, 601; Beale, Cardinal Rules, Interpretation, 580, 581; *Colpoys* v. *Colpoys,* Jacob, 451; 53 R. R. 42; Note to Cockle Lead. Cas. on Ev. 300; *Matter of Phipps,* 214 N. Y. 381. It is often said that the circumstances surrounding a testator at the time of execution of the will may always be given in evidence in cases of construction. But I apprehend that this is true only when there is an equivocation or uncertainty as to the meaning of the will, or as to the persons or property referred to therein. *Smith* v. *Smith,* 1 Edw. Ch. 189; *Bunner* v. *Storm,* 1 Sandf. Ch. 357; *Matter of Raab,* 79 Misc. Rep. 185; *Matter of Vosseler,* 89 id. 674. In the will before me there is no equivocation; the words and meaning of Mr. Fowles' will perfectly coincide, and

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therefore extrinsic evidence was inadmissible. But the extrinsic evidence offered and taken in this matter was entirely harmless and quite unnecessary in my judgment, as every fact testified to would be presumed by the court from the will and coverture of Mr. Fowles without extrinsic evidence. Whether instructions to an attorney for drawing a will are ever competent to explain the text of a will I doubt. *Murray* v. *Jones,* 2 V. & B. 318; cf. *Webber* v. *Stanley,* 16 C. B. (N. S.) 698. Indeed, whether Mr. Prendergast, the draftsman of the wills, should have been allowed in this state to testify to his instructions, is also open to doubt. I had occasion to consider this point in *Matter of Francis,* 73 Misc. Rep. 153, 154. But the extrinsic evidence in this matter may be disregarded, without harm, by reason of the fact that it was inconsequential.

Let me refer for a moment to the general law governing successions from *commorientes* who perish in a common disaster. The principle of the common law, that in the absence of all proof of actual survivorship there is no presumption of survivorship among those who perish in a common disaster, and no presumption of simultaneous death was referred to at length by me in my decision in a proceeding in this court involving the deaths in a common disaster of the Laffargue family. *Matter of Herrmann,* 75 Misc. Rep. 599, 601. My decision was affirmed by a divided court. *Matter of Laffargue,* 155 App. Div. 923. The *Laffargue* case, however, ultimately turned on slight proof of actual survivorship, reinforced by circumstantial proof. Singularly enough, long after the formal confirmation of my judgment, I happened to read a very old case, now part of our common law, in the absence of conflicting domestic authority. *Broughton* v. *Randall,* Cro. Eliz. (A. D. 1596) 503. This old case, precisely in point, would have been con-

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clusive of the *Laffargue* case, but fortunately my decision conformed in every respect with the old decision stating the common law. That the common law of England and this state, unlike the civil law, raises no presumption of survivorship, in the absence of all proof of the fact is familiar to us all. *Underwood* v. *Wing*, 19 Beav. 459; *Newell* v. *Nichols*, 12 Hun, 604; 75 N. Y. 98; *Wing* v. *Angrave*, 8 H. L. Cas. 183. In some other states of the Union, while there is no presumption of survivorship, there is a presumption of simultaneous death where persons are shown to have perished in a common disaster and there is no proof forthcoming of survivorship or moment of death. *Johnson* v. *Merithew*, 80 Maine, 111; *Matter of Wilbor*, 20 R. I. 126. In those states having this modified rule the property is distributed as if the deaths were simultaneous. *Johnson* v. *Merithew, supra; Matter of Wilbor, supra.* At common law and in this state where there is no presumption of even simultaneous deaths, if the claimant cannot make out actual survivorship, the gift over fails, and the property in controversy either passes into the residuum or by intestacy (*Elliot* v. *Smith*, 22 Ch. Div. 236; *Matter of Alston*, 1892, P. 142; *Wing* v. *Angrave*, 8 H. L. Cas. 183; *Newell* v. *Nichols*, 75 N. Y. 78, 90; *St. John* v. *Andrews Institute*, 191 id. 272), unless there is a substitution over.

That the common law raises no presumptions whatever in cases of this character is, perhaps, not always an advantage in the administration of justice. In *Matter of Laffargue* I referred to the unjust criticism of the presumptions of survivorship entertained in the civil law, with proper reference to the texts of the Pandects, and I attempted to show that in some instances the civil law presumptions were entirely reasonable and logical. Had the common law presumed simultaneous death, it would not have been a violent pre-

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sumption, and there would have been at least one established premise for our courts of construction to work on. As it is, there is none in this state. The common law of England and the common law of this state treat survivorship or time of death as absolutely insoluble in the absence of proof. The result is that the *onus* at common law is placed on those asserting either the survivorship or the simultaneous death of one of two persons who perish in a common disaster. As a generality, the fact of death in a common disaster is susceptible of proof, but the relative time of the individual deaths of *commorientes* is not often susceptible of proof. Thus it is in this case: Whether Mrs. Fowles perished at the same moment as her husband, or before or after him, stands without proof, and under the circumstances the common law raises no presumption whatever. Whether there is a tendency to recede from this doctrine in this state I shall not presume to consider. But I observe in *St. John* v. *Andrews Institute,* 191 N. Y. 272, the court said: "In such case the question of actual survivorship is regarded as unascertainable, and descent and distribution take the same course as if the deaths had been simultaneous."

The effect of the 9th clause of Mr. Fowles' will will now be considered. It will be regarded first as a direction to a court of construction to reverse an accepted rule of the common law and thus reverse a rule of construction based on that rule. What effect, if any, can this direction contained in the 9th clause of Mr. Fowles' will have, regarded only as a direction to the court? This point, while insisted on, is not much argued in the briefs, and then without citations of authority. In my judgment the direction in question can have no effect, regarded as a direction to a court of construction. Presumptions prescribed by the common law and rules of construction based thereon are

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fixed and immutable and cannot be thus directed to be altered by the court to meet particular cases. In the French law it is said, according to my own translation, that a testator may in his will impose no condition which wounds the law or good morals. 1 Troplong Donations et Testaments, § 272. It seems to me that this author expresses with the usual Gallic clearness the proper limitation on testamentary directions of all testators. Our system of jurisprudence is not different on this point. Directions in wills in order to be upheld must contravene neither the law nor good morals. The effect of an unauthorized imposition on testamentary gifts I had occasion to review in *Matter of Anonymous,* 80 Misc. Rep. 10, reported as Anonymous in order to save an obscure child from publicity, obloquy and threatened expulsion from school. The unlawful direction in that case was, however, a condition subsequent and not a direction for construction, but, *mutatis mutandis,* I find myself unable to add more to the reasons there assigned for the invalidity of the unlawful direction contained in Mr. Fowles' will if it is to be construed as a testamentary mandate to the court to alter a legal presumption and a resulting rule of construction.

But it seems to the surrogate that the 9th clause of Mr. Fowles' will is not to be taken as a direction by testator to a court of construction to alter an established presumption or canon of construction. It is susceptible of another meaning. In the construction of wills an illegal intendment on the part of a testator will not be presumed if another construction is possible. *Roe* v. *Vingut,* 117 N. Y. 204, 218; *Smith* v. *Edwards,* 88 id. 92, 102; *Matter of De Bolet Peraza,* 72 Misc. Rep. 577, 581. Words which admit of a twofold construction — one valid, the other invalid — will always be given the sense which validates them.

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Pond v. *Bergh*, 10 Paige, 140; *Butler* v. *Butler*, 3 Barb. Ch. 302. It is hardly worth while to waste time in citing authorities for such an elementary rule of construction of all written instruments as "*Ut res magis valeat quam pereat.*"

Nor is it necessary to do more than refer to that cardinal principle of construction (not peculiar to wills alone, but common to all other writings) that the intention of the makers is always to govern construction. But I must not forbear to notice that in the interpretation of wills a will is to be regarded as a unilateral instrument and not a bilateral juristic act. In the course of the development of our own system of jurisprudence — the common law — a devise, as contrasted with a testament, was at one time regarded as a conveyance. During the prevalence of this conception there was a tendency for a time to regard a will of lands as a bilateral juristic act, and the earlier canons of construction applicable to devises were somewhat influenced by this tendency. But that time has long passed, and a last will and testament in our laws is now regarded as a unilateral instrument for the purposes of interpretation. In interpretations of wills doubtful passages must be construed in the sense in which the testators desired them to be understood, and not in the sense which the takers or beneficiaries desire. This is a fundamental canon in all systems of law. The civil law is most express on this point (D. 28, 1, 1; D. 50, 17, fr. 96), and the common law of this state not less so. Mr. Fowles' will is to be construed only in the sense intended by him and not in the sense it was understood by Mrs. Fowles. It would be highly fallacious to take into consideration the sense in which Mrs. Fowles understood her husband's will. I cannot help thinking that the vice of that position has been obviated

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by my disregard of the extrinsic evidence offered and taken without objection.

It is to me obvious that Mr. Fowles' real intention by the 9th clause of his will was to prevent a lapse in the event of Mrs. Fowles' incapacity in any way to take under his will. In that event Mr. Fowles intended that there should be a substitution of some one else in her place. There is nothing contrary to any rule of law in this intention. Shifting uses and executory limitations, freely allowed at common law, were largely matters of substitution. Whenever there is in a will an intention to substitute another in the place of a legatee or devisee dying during the lifetime of a testator, or at the same time as testator, or immediately after testator, so as to be unable to take and hold, then that other named as substitute will take by substitution, if vesting is concurrent and there is no perpetuity. No rule of law is then violated by this principle, and it enables us to give effect to the obvious intention of the testator. Substitution is the common remedy for lapse. In order to meet the difficulties of the common law in the instances of *commorientes* nearly allied by blood, affinity or consanguinity, there seems to be a tendency in the United States to hold that a gift over, if principal legatees "die before testator," is substitutional. *Young Women's Christian Home* v. *French,* 187 U. S. 401; *Matter of Piffard,* 111 N. Y. 410, 413; *St. John* v. *Andrews Institute,* 191 id. 254. In *Matter of Malo,* 76 Misc. Rep. 416, 420, I gave effect to this principle, although in order to support the substituted gift over I was compelled to adjudge that under the Statute of Powers in this state the power of appointment donated by the principal will never vested. This last point I decided on our domestic law of powers. In the application of rules of property I rarely seek authorities or analogies out of our own jurisdiction. The

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Revised Statutes are now nearly a century old and our domestic law of property is generally independent of the aid of analogies afforded in foreign states. But I am, however, happy to observe from the briefs submitted in this cause that my decision in the *Mayo* case precisely accorded with the analogous decisions on powers taking effect under the old Statute of Uses. *Sharpe* v. *McCall,* 1 Ir. Rep. (Chan. & Land Com. 1903) 179; *Jones* v. *Southall,* 32 Beav. 31.

In testaments the wishes of testators are to be very liberally expounded in all courts of construction. "*In testamentis plenius voluntates testantium interpretantur.*" Paulus, ff. 50, 12. This rule of the civil law was long since adopted by our courts, as may be seen in Emerton's admirable treatise entitled "*De conjecturis ultimarum Voluntatum.*" Page 68, Oxford, 1884. Mr. Emerton reviews the civil law principles generally taken over by courts of construction operating under the common-law system. Unfortunately for its popularity, Mr. Emerton's treatise is written in Latin. But it makes evident that a principle of construction which is 2,000 years old is still in *viridi observantia.* A principle so old is certainly entitled to every consideration in courts of this character. The rule of construction cited means that the lawful intention of the testator should be supported fully by every solid and reasonable conjecture. It is self-evident that Mr. Fowles knew that his wife could take no personal benefits under his will if she perished before him or at the same time or even immediately after him. Knowing all this, as he must have known it, his will provides, in substance, that in any of these events the provisions for his wife shall inure to the benefit of her successors. This can only mean that Mrs. Fowles' personal representatives were to have the benefit by substitution of the provisions of his will intended primarily for her.

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Inartificially perhaps, but to my mind clearly, he expressed his testamentary intention that his legacies to his wife should not lapse, but pass by substitution to those who in law were the successors of her person. In effect Mr. Fowles said plainly enough that in the event of his wife's incapacity from any cause those who represented her in law should be substituted in her place in so far as was consistent with the rest of his own will.

That the courts of this state are inclined to construe gifts for the benefit of a person, if he die before testator, as substitutional, in order to defeat a lapse where that is the expressed intention of testator, is disclosed by *Matter of Piffard*, 111 N. Y. 410. In principle that case is decisive of this, although the facts differ. But it is not the similarity of the facts which causes a decision to be a precedent, but the relevancy of the principle laid down. According to the doctrine of *stare decisis,* which is a fundamental of the common-law system, the only thing in a decision binding as an authority is the right principle upon which the case was decided and not the application of such principle. *Matter of Tod, No. 1,* 85 Misc. Rep. 298, 303, 304. This is so obvious to all persons familiar with the development of the common law that it needs no citation of authority. In *Matter of Piffard* the legatee Sarah predeceased the testator, and in that event her share was directed to be paid over to her executors. The gift over was sustained as substitutional in order to prevent a lapse. Every argument urged against the conclusion reached by the court is identical with those urged here.

Who was intended by Mr. Fowles to take by substitution in the event that his wife could not take is not ambiguous or doubtful. It is obviously those persons who in law continued her legal existence, viz., her

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executors. Who these are is a mere matter of identity, and it is determined by Mrs. Fowles' will, which is proper extrinsic evidence for that purpose. Her executors take by substitution, but they take as her executors for the uses and purposes prescribed by her will. They do not take individually. That this was Mr. Fowles' express intention I have no doubt, and I can detect no illegality in such intention to carry the primary donations to Mrs. Fowles over to her executors by substitution in the events which have actually occurred. This was the conclusion and principle established by *Matter of Piffard*. It is this principle which, under the doctrine of *stare decisis*, controls this case now before me.

That common-law courts are inclined to a large and liberal construction in order to carry out the expressed intentions of testators is evident from such famous cases as that of *Masters* v. *Masters*, 1 P. Wms. 421, where a legacy to a Mrs. Sawyer was held to be intended for a Mrs. Swapper, as testator knew no such person as Mrs. Sawyer. The court properly held in that case "*id certum est quod certum reddi potest.*" The identification of legatees may be aided by extrinsic evidence.

The principle of exclusion applies in interpretation of wills. From the 9th clause of Mr. Fowles' will it is apparent that testator intended to exclude or segregate from his general estate the legacies given to the use of his wife. These he appropriated to her in all the events which occurred or could have occurred. In no event did he intend that these legacies should accrue by his will to his own next of kin. When this is certain beyond all peradventure, the court should not be astute to find reasons for benefiting directly those whom in no event testator himself wished to be benefited. To benefit by construction those not intended by testator

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to be benefited is contrary to all systems of jurisprudence, except, possibly, our own. Both Lord Mansfield and the English civilian, Phillemore, are justified in criticising those rules of construction defeating testators' expressed intention. Phillemore, in particular, has no words too harsh for canons of construction which defeat a testator's expressed intention. If Mr. Fowles' expressed intention that the legacies to his wife should not lapse is so defeated, the criticism of our principles of interpretation will be justified.

My conclusion is that the executors of Mrs. Fowles are entitled by substitution to the sum of $5,000, bequeathed by the testator to his wife in subdivision 8 of paragraph 2 of the will, to the bequest of personal property contained in paragraph 4 thereof, and to one-half of forty-five per cent of the residuary. The devise of testator's real estate at Cobham, county Surrey, England, was made upon the condition that the devisee elect to take it at a valuation of £8,250. The right of election was given to her personally and is extinguished by her death; it cannot be exercised by her executors. Her failure or incapacity to exercise the election *per se* defeated the devise and the alternative disposition directed by the testator takes effect, namely, that the real estate be sold and the proceeds added to the residuary.

The manner in which the executors of Mrs. Fowles' estate should pay over this property cannot be determined by the court in this proceeding, as her will is not properly before the court for construction. The surrogate will not consider in this proceeding a construction of the will in its relation to the proceeding now pending to determine the transfer tax upon the estate of the testator as the state comptroller is not a party to this proceeding.

Decreed accordingly.

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Matter of the Estate of JACOB VETTER, Deceased.

(Surrogate's Court, New York County, April, 1916.)

Wills — execution of — contested probate proceeding — when bill of particulars denied — exercise of undue influence.

In a contested probate proceeding an application for a bill of particulars which must state the names of the persons who, as alleged by contestant, exercised undue influence on testator in the matter of the execution of the will, will be denied.

PROCEEDING upon the probate of a will. Application for a bill of particulars.

Lewis S. Goebel, for proponents.

Low, Miller & Low, for contestants.

Morris Blau, for Herman Lips.

FOWLER, S. A petition has been filed asking that a certain script, purporting to be the last will of the deceased, be admitted to probate, and objections to the probate have been filed by certain of the next of kin. In their objections the contestants allege that the execution of the script was obtained by undue influence, and the proponent makes this application for a bill of particulars which will state the names of the persons who exercised the undue influence on the testator. I am inclined to think that the contestants should not be compelled to give the names of such persons prior to the trial, as the terms of the will usually indicate the particular individuals who are so benefited by its provisions as to create a suspicion in the minds of those less favored that undue influence was exercised on the

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testator, and the persons who had facilities for that close and intimate relationship with the testator which would afford them an opportunity for exercising undue influence are invariably well known to the proponent. The application is, therefore, denied.

Application denied.

Matter of Proving the Last Will and Testament of JACOB VETTER, Deceased.

(Surrogate's Court, New York County, April, 1916.)

Trial — in contested probate proceeding — new Surrogates' Law — when motion for new trial denied.

The course of a jury trial in a contested probate proceeding rests largely in the discretion of the surrogate presiding at the trial, and where the order of proof and the conduct of the trial on the issues submitted to the jury under the new Surrogates' Law were correct a motion for judgment on the findings of the jury in favor of the will will be granted and a motion for a new trial denied.

The practice on the trial of contested probate proceedings with juries under the new Surrogates' Law indicated.

PROCEEDING upon the probate of a will

Lewis S. Goebel, for proponents.

Low, Miller & Low, for contestants.

Morris Blau, for Herman Lips.

FOWLER, S. The motions for judgment on the findings of the jury and for a new trial having come on to be heard, pursuant to the practice indicated in *Matter of Dorsey*, 94 Misc. Rep. 566, I have examined the

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record and find no error of substance. The order of proof and the conduct of the trial in this matter on the issues submitted to the jury under the new law regulating contested probate proceedings before juries were correct. The order of proof at common law is always in the discretion of the trial judge presiding at jury trials. The surrogate can have no less, no greater, or no different powers, I presume, in jury trials held in this court. In order that contested probates conducted with juries may not degenerate into unlicensed and irregular trials, some prescribed order of proof is essential. Unfortunately there is no express precedent or law regulating trials in contested probate proceedings tried with juries. The nature of the issues to be submitted to the jury in conformity to the new law are in the form of questions. I have considered this point in *Matter of Plate,* 93 Misc. Rep. 423, and until the new practice is passed on by the higher tribunals I shall continue to be guided by the reasons there stated. The pleadings in Surrogates' Courts by the Surrogates' Law seem to be merged in the questions directed to be submitted to the jury (*Matter of Plate,* 93 Misc. Rep. 423; General Rules of Practice, 31; Rule VII, Surrogate's Court, N. Y. County; *Matter of Eno,* 94 Misc. Rep. 100), and they do not figure on the trial of the contested probate proceeding before a jury. Contested probates carried on under the new Surrogates' Law of 1914, with the aid of a jury, thus offer a singular anomaly to the course of the common law. The written pleadings in this court have no part in the trial. The issues framed for submission to the jury are directed to be in the shape of questions to be answered by the jury. The questions are, by the new law, made a substitute for pleadings. There is now no statute regulating the procedure or burden of proof in contested probates before juries as was formerly

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the case under section 2653a (old Code of 1913). The course of such a trial must, therefore, rest largely in the discretion of the trial surrogate presiding at the trial term of this court in this county, where jury trials are most frequently demanded. By reason of the omission in the new Surrogates' Law I have felt it incumbent on me to regulate the order of proof and the general procedure on the trial in contested probate proceedings with juries. I require the proponent of the will, after a brief opening on the part of counsel, pursuant to general rule 29, to proceed to prove the requirements exacted by the Statute of Wills for testamentary dispositions of property, and I limit strictly the cross-examination of the attesting witnesses to matter brought out on the direct examination. When the requirements of the Statute of Wills are proven the proponent ordinarily rests. If the will is not proved by proponent *prima facie* the trial necessarily comes to an end. If the will is proved *prima facie*, then the contestant takes up the burden of proceeding further. Contestant has first an opportunity to disprove *factum* if he can, and next to establish by proof the substance of his affirmative pleas, or rather the affirmative of the questions put at contestant's particular request to the jury, for, as I said, there are no pleadings in this court in jury trials in probate proceedings. When the contestant has rested the proponent then offers his adminicular proofs, or his proofs in rebuttal, as the case may require. The burden of proof and the summing up I regulate as best I can according to the real right to the affirmative positions on the questions to be submitted to the jury. In this way some sort of order and method of trial is preserved. If there is any binding authority or precedent for this course indicated I have not found it, but it seems, nevertheless, to conform in some measure

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with the course of the common law, which, I take it, is a necessary adjunct to trials with juries held even in this court. Any other course than that indicated produces very bad results and may prove most unjust to the testamentary power in general. A haphazard and unregulated trial in a contested probate proceeding before a jury is full of danger to dispositions of property by last will and testament and should not be allowed. Where there is no dispute or disproof of the due execution of the will propounded, the questions framed for the jury involving execution should never be submitted to the jury without an unequivocal direction by the surrogate to answer them in the affirmative. If there is no issue of fact on execution of the testamentary paper to submit to the jury such questions, because there is another distinct issue for them, would be both illegal and confusing, and unnecessarily jeopardize the will propounded. I know of no judicial action more in conflict with common-law principles than to submit to a jury some matter of which there is no disproof, or which is not really contested. Such an outrage upon legal order would call for summary vindication upon the part of some competent authority in any state based on law and order. If there is an affirmative issue of undue influence, for example, and no issue of last will and testament, the issue of undue influence should alone be left to the jury. Any other course is plain error under the established law, not only of this state, but of all other common-law states. It is the right of any party to a contested probate proceeding to ask for a direction for verdict by the surrogate when the proof is altogether unilateral, and it would be fatal error on the part of the surrogate to refuse the direction. The answers of the jury to the questions propounded to them in contested probate proceedings are not made conclusive on the surrogate

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when the trial is in this court, as I showed in *Matter of Eno,* 94 Misc. Rep. 100, and *Matter of Plate,* 93 id. 423. The surrogate is still by the statute made solely responsible for the decree of probate. Code Civ. Pro., § 2614. The new Surrogates' Law expressly reserves to the surrogate the duties and obligations of a probate judge. By the clear mandatory terms of the act he cannot admit any will to probate until he himself is satisfied with the genuineness of the will and the validity of its execution. Code Civ. Pro., § 2614. This is the great and cardinal section of the new law in so far as it relates to probate proceedings in this court. Section 2614 of the Code of Civil Procedure cannot be brushed aside by implication, nor can it be minimized without a violation of all the principles of interpretation of acts of the legislature. The sections relating to the submission of issues to the jury are to be read in connection with section 2614. All sections of an act are to be read together and harmonized, if possible. None of them can be construed disjunctively, abstracted from all the residue of the context of the act as if enacted separately. Every legislative act must be read as a whole, and all parts given effect, if possible. *Allen* v. *Stevens,* 161 N. Y. 122, 145; *Clary* v. *Fitzgerald,* 155 App. Div. 659, 664. There is nothing in the Code which makes a verdict of a jury in a Surrogate's Court conclusive on the surrogate in a probate proceeding unless the trial is had in the Supreme Court. Section 970 of the Code of Civil Procedure refers only to actions and not to special proceedings, which a contested probate proceeding is. It cannot be incorporated by relation in the Surrogates' Law, because it is inconsistent with section 2614 of the Code of Civil Procedure, which is jurisdictional and mandatory in all contested probates in this court. *Matter of Plate,* 93 Misc. Rep. 423; *Matter of Dorsey,* 94 id. 566;

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Matter of Eno, 94 id. 100. In this matter there was no error on the trial, and the motion for judgment on the findings of the jury must, therefore, be granted and the motion for a new trial denied. The decree will provide for the probate of the will as a will of real and personal property.

Probate decreed.

Matter of the Estate of JOHN NEHER, Deceased.

(Surrogate's Court, New York County, April, 1916.)

Taxes — gift of income to wife during life with power to dispose of one-half of remainder by will — when not subject to transfer tax — when remainder taxable — Tax Law, § 230.

Decedent gave the income of all his estate to his wife during her life, with power to dispose of one-half of the remainder by her will. He also empowered her to use so much of the principal of the estate as she considered necessary for enjoyment and support, and provided for the disposition of any part of his estate not used by her during her lifetime, or disposed of by virtue of the power of appointment. Held, that one-half of the remainder over which the widow was given the power of appointment was not presently subject to a transfer tax.

Under the provision of section 230 of the Tax Law that where property is transferred in trust and the interests of the transferees are dependent upon contingencies whereby they may be defeated the tax shall be imposed upon such transfer at the highest rate, subject to return on the happening of a contingency whereby the property comes to a person exempt from the tax, the one-half of the remainder not subject to appointment is forthwith taxable.

APPEAL from order fixing and assessing the transfer tax.

Daniel Seymour (Henry Parsons, of counsel), for executors.

Adolph E. Gutgsell, for legatees Anthony and John Krohe.

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Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for state comptroller.

FOWLER, S. The executors of decedent's estate allege that they are dissatisfied with the appraiser's report because it suspends taxation of the remainder after the life estate of Marie E. B. Neher in the sum of $15,059.02, and they have appealed from the order entered on the report. The decedent gave the income of all his estate to his wife during her life, with power to dispose of one-half of the remainder by her will. He also empowered her to use so much of the principal of the estate as she considered necessary for her enjoyment and support. By a subsequent clause he provided for the disposition of any part of his estate that was not used by his wife during her life or disposed of by virtue of the power of appointment given to her. The appraiser reported that the value of the widow's life estate in the entire estate left by the decedent was presently taxable. He reported that the remainder was not presently taxable, as one-half of it was subject to a power of appointment, and the life tenant had the power to use so much of it as she considered necessary. The one-half of the remainder over which the widow has a power of appointment is not presently taxable. *Matter of Howe*, 86 App. Div. 286; affd., 176 N. Y. 570. The amendment of section 230 effected by chapter 800 of the Laws of 1911 did not change the language of the statute so as to make the principle of the decision in *Matter of Howe* inapplicable, as that amendment provided only for the entry of a temporary order by the surrogate. That part of section 230 which provides for the imposition of a tax at the highest rate was in force at the date of the decision in *Matter of Howe, supra.* Therefore that decision is still controlling, and a remainder which is subject to an absolute power of appointment is not taxable until the power is exercised.

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As to the other one-half of the remainder, I am inclined to think that its taxation is governed by the decision of the Court of Appeals in *Matter of Zborowski*, 213 N. Y. 109, and that that decision in effect overrules the decision in *Matter of Babcock*, 37 Misc. Rep. 445; affd. without opinion, 81 App. Div. 645. All the property of which the decedent died seized or possessed was transferred by his will. The Tax Law provides that the tax is imposed upon the transfer of the property, but the rate of taxation is dependent upon the value of the interest transferred. The widow has a life interest in all the testator's estate, consequently the value of that life interest is presently taxable. She may also use all the property, and it is, therefore, impossible to ascertain the exact amount that will pass to the legatees who are given one-half of the remainder after her death. Section 230 provides that where the property is transferred in trust, and the interest of the transferees are dependent upon contingencies whereby they may be in part defeated, the tax is imposed upon such transfer at the highest rate which, on the happening of any of the contingencies, would be possible. One-half of the remainder after the life estate of the widow is transferred to legatees, but their interests are liable to be defeated by the widow using all the property. Such transfers, therefore, are within the language of section 230 of the Tax Law, and are presently taxable. *Matter of Zborowski, supra.* The order fixing tax will be reversed, and the appraiser's report remitted to him for the purpose of assessing a tax at the highest rate upon one-half of the remainder after the life estate of the widow.

Order reversed.

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Matter of the Petition of FRANKLIN TRUST COMPANY, ELLEN H. THORNE, SAMUEL and RICHARD VAN WYCK THORNE, to Render and Settle Their Accounts as Administrators Cum Testamento Annexo of ELLEN S. HASLETT, Deceased.

(Surrogate's Court, Kings County, April, 1916.)

Bequests — of government bonds and bank stock — income of securities accrued since death of testatrix.

A bequest of all government bonds and bank stock of which testatrix might die possessed carries with it all the income of such securities accrued since the death of testatrix.

PROCEEDING upon the judicial settlement of the accounts of administrators with the will annexed.

McKeen, Brewster & Morgan (Richmond L. Brown, of counsel), Beekman, Menken & Griscom (S. Stanwood Menken and Ewing R. Philbin, of counsel), for Ellen Haslett Thorne (Mrs. Samuel) and Richard Van Wyck Thorne, legatees.

John T. Bladen, for John T. Bladen, as one of the committee of the property of Samuel E. Haslett, an incompetent person.

KETCHAM, S. The will under which this account is made contains the following:

"*Third.* I give and bequeath all the securities of which I may die possessed, and by this I intend only securities, such as Government Bonds and Bank Stock, to Ellen Haslett Thorne and Richard Van Wyck

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Thorne, children of Q. Maynard Thorne, of New York City, to be divided between them, share and share alike."

This legacy is as if the language thereof was "I give the government bonds and bank stock of which I may die possessed."

Authority amply sustains the claim that this was a specific legacy of all the securities held by the testatrix at her death which were of the nature described.

For this *Tifft* v. *Porter*, 8 N. Y. 516, 521, may be cited generally.

Other cases, together with the expressions respectively construed therein to constitute specific gifts, are as follows: *Matter of Tailer*, 147 App. Div. 741: "All amounts of insurance upon my life that are payable at my death * * * all the moneys due and to become due and all that may be collected from every policy of insurance now outstanding or that may hereafter be issued upon my life."

Matter of Werle, 91 Misc. Rep. 398: "Any money remaining to my credit in the Bank of Savings."

Hamilton v. *Hamilton*, 75 Misc. Rep. 21: "Any moneys and securities to me belonging at my decease."

Matter of Howard, 46 Misc. Rep. 204: "All my deposit of money in the Erie County Savings Bank at Buffalo or the Empire State Savings Bank and in both said banks whether in open account, pass book or certificate."

Larkin v. *Salmon*, 3 Dem. 270: "All the money left in the West Side Bank."

Perkins v. *Mathes*, 49 N. H. 107: "My books and papers of every description."

Towles v. *Swasey*, 106 Mass. 100: "Whatever sum may be on deposit in Provident Savings Institution."

It follows that the specific legacies are entitled to all the income of such securities accrued since the death.

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The expression found in *Matter of Bergen*, 56 Misc. Rep. 92, was not essential to the decision, and it is arrayed against a mass of opinion represented by the cases cited *supra*.

The account is, therefore, settled as made.

Decreed accordingly.

Matter of the Petition of FREDERICK A. MAGENHEIMER and JULIUS LEHRENKRAUSS, Jr., to Render and Settle Their Intermediate Account as Trustees under the Last Will and Testament of LOUIS MAGENHEIMER, Deceased.

(Surrogate's Court, Kings County, April, 1916 .)

Trusts — devise in trust — infants — wills — when devise to trustees subject to power of sale — accounting by trustees.

Testator, who left but one minor child, gave one-third of his estate to his executors in trust to pay the net income to his wife during her life or widowhood, with direction in the event of her death or remarriage to pay to testator's children then under age the net income of a separate one-fifteenth of said trust estate. Held, that in the event of death or remarriage of testator's widow each child then of age took one-fifteenth of the fund as a devise.

Where as to the remaining two-thirds of testator's estate one-fifth thereof or two-fifteenths of the estate was devised to each child who should be of age at the death of testator, any child then under age took a devise in trust of one-fifteenth of the estate the net income thereof payable to him during minority and the principal of such two-fifteenths at his majority.

Where a devise of testator's lands whether to trustees or individuals is subject to a power of sale in the executors alone, though they are also the trustees, they, on accounting as trustees, are only entitled to commissions upon that portion of the estate devised to them in trust.

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PROCEEDING upon the settlement of the intermediate account of trustees.

Reynolds & Geis (Leonard J. Reynolds, of counsel), for trustees.

William P. Pickett, special guardian.

KETCHAM, S. The will under which this accounting is made contains implied trusts and, therefore, devises in trust to the executors.

Under one of these one-third of the estate is given in trust to pay the net income thereof to the wife during her life or widowhood, and in the event of her death or remarriage to pay to each of the testator's children then under age the net income of a separate one-fifteenth of the fund so given in trust for the minority of such child.

In the event of the death or remarriage of the wife there is devised to each child then of age a one-fifteenth of the said fund.

As to the remaining two-thirds of the estate, there is a devise of a one-fifth share thereof, or two-fifteenths of the estate, to each child of the testator who shall be of age at the death of the testator. As to any child then under age, there is a devise in trust of two-fifteenths of the estate to pay to such child the net income thereof during minority, and to pay to him the principal of such two-fifteenths upon his attaining majority.

This construction is required by authority. *Seitz* v. *Faversham*, 205 N. Y. 197; *Mee* v. *Gordon*, 187 id. 400; *Matter of Dewey*, 153 id. 63; *Ward* v. *Ward*, 105 id. 53; *Morse* v. *Morse*, 85 id. 53.

The rule to which this will is subject has never received better expression than in the case of *Ward* v.

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Ward, supra, in which it is said: "When the duties imposed are active and render the possession of the estate convenient and reasonably necessary, the executors will be deemed trustees for the performance of their duties, to the same extent as though declared to be so by the most explicit language."

None of the cases cited by the special guardian contain any denial or modification of this principle of construction. Those in which it was found that a trust could not be implied were expressly based upon the recognition and use of this principle.

The testator left only one minor child, and the observations *supra* with respect to trusts for infant children are limited accordingly.

The executors named in the will are also the trustees, but the power of sale under which lands have been sold is given in name to the executors only. While this power might vest in the trustees as an adjunct of the trust, if the lands sold were wholly embraced in the trust, it must be otherwise when eight-fifteenths of the lands were devised to individuals and seven-fifteenths were devised to the trustees.

In such case it would be impossible for the trustees, in pursuance of their trust, to sell any part of the eight-fifteenths; and it would be scarcely conceivable that an undivided portion of the lands could be sold by the executors and another portion sold by the trustees.

It is according to the text of the will that the executors may sell the entirety, while it is contrary to the testamentary expression that the trustees can do so.

The solution, which coincides with reason as well as the letter of the will, is that the power resides in the executors alone, and that the devise, whether to trustees or individuals, was subject to the exercise of the power.

Hence commissions upon the proceeds of the sale

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under the power might well be awarded to executors upon an accounting in that capacity, but in this account, which is confined to the trust, there can be commissions to them as trustees only, to be calculated upon seven-fifteenths of the proceeds, and the income therefrom. This calculation must be upon a trust estate less than $100,000 in value, since it cannot include all the proceeds of sale.

The decree may proceed accordingly.

Decreed accordingly.

Matter of the Petition of the MISSIONARY SOCIETY OF THE MOST HOLY REDEEMER in the State of New York, for an Order Directing GRACE ROARTY and WILLIAM DE DEYN to Make and File Their Account as Administrators of ANNIE MAGUIRE, also Known as ANNA MAGUIRE, as to Her Proceedings as Executrix of the Last Will and Testament of JOHN MAGUIRE, Deceased.

(Surrogate's Court, Kings County, April, 1916 .)

Savings banks — when account opened in name of husband and wife — to whom deposit belongs — evidence.

Where at the time a savings bank account was opened in the names of husband and wife there was no proof as to the ownership of the funds deposited, or any part thereof, in the absence of evidence of an agreement or intention that the deposits were jointly owned, or that either party to the account should take by survivorship, the deposit belongs to the wife who survived her husband and forms no part of his estate.

APPLICATION for an order directing administrators to make and file their account.

Ernest P. Seelman, for administrators.

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Lewis S. Goebel (George V. Grainger, of counsel), for objector.

W. J. O'Donnell, for next of kin of Annie E. Maguire.

KETCHAM, S. The savings bank accounts which are the subject of controversy were opened in the names of husband and wife, without evidence in the style of the account, unless it is found in the names themselves, or in any other form, of an agreement or intention that the deposits were jointly owned or that either party to the accounts should take by survivorship. There is no proof as to the ownership of the deposited funds, or any part thereof, at the time of the deposits.

It was once regarded as settled law that under such circumstances it was to be presumed that each of the parties to the transaction owned one-half of the fund individually, that the deposit was the subject of common, and not joint, ownership, and that there was no agreement or purpose that either should take upon the death of the other.

While the decisions in this regard had a firm, but narrow, basis in the rules affecting ownership in common, they took little heed of the common sense — the popular conception — that such deposits would ordinarily not be made, except with the intent that upon the death of one of the parties the other should take the whole fund.

It may well be asserted that in any case where, in obedience to rules unknown to the laity, a deposit of this sort was held to be in common and not subject to survivorship, the wish and understanding of the unlearned parties was disappointed.

There are signs of retreat in the recent opinions on this subject.

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In *Matter of Thompson*, 167 App. Div. 356, the Appellate Division of the first department held that deposits in no respect different from the transactions involved in the case at bar were intended to belong to the wife upon the death of the husband.

The court says: "At the death of the decedent $12,830.82 was on deposit in various banks in accounts entitled 'Alexander Thompson or Mary E. Thompson.' The surrogate held that inasmuch as the evidence did not show how much of the deposits belonged to the decedent and how much to his wife, it would be presumed one-half belonged to each. In reaching this conclusion we think he erred."

While the opinion cited does not treat of the cases expressly contrary to the result therein reached, and is content with stating only cases in which it was known that the moneys deposited were wholly owned by the husband and were deposited by himself, the holding itself cannot be misunderstood.

The accompanying decision of the same Appellate Division, in *Matter of Dalsimer*, 167 App. Div. 367, was addressed to a transaction in which the parties, however they held the funds involved, made profuse and inevitable evidence of their intent and agreement that their investment should be joint and not common, should vest in each an immediate "unity of interest, unity of title, unity of time and unity of possession," and should, upon the death of one, be the property of the other by an ownership instituted at the time of the investment. That case is of no present avail.

The authority of the *Thompson Case, supra*, in the Appellate Division was still subordinate to the explicit judgment of the Court of Appeals in *Matter of Albrecht*, 136 N. Y. 91, and *Matter of Kaupper*, 201 id. 534, affg. 141 App. Div. 54, as well as the equally plain rulings of *Wetherow* v. *Lord*, 41 id. 413, and

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Matter of Wilkens, 144 id. 803; but the case has been affirmed without question of the views upon which the result was based. 217 N. Y. 609.

The decision has been regarded by Mr. Surrogate Schulz as authority for his own ruling, as follows: "The fact that the bond, mortgage and certificate of deposit were taken in the names of the husband and wife, in the absence of evidence to the contrary, shows an intention to create in the wife the right of survivorship." *Matter of Keil*, 91 Misc. Rep. 667.

It follows that the deposits in question belonged to the wife and formed no part of the estate of the husband intestate.

The account must be approved as made.

Decreed accordingly.

Matter of the Petition of FANNY E. ANDERSON and INGEBORG M. POWELL to Render and Settle Their Account as Administratrices of CHARLES G. F. LINDSTRAND, Deceased.

(Surrogate's Court, Kings County, April, 1916.)

Decedents' estates — mortgages — sale of real estate by administrator for payment of debts — when proceeding to sell defective — executors and administrators — title.

Where an heir at law of a decedent gave a mortgage upon all his right, title and interest in the estate of decedent sold by his administrator for payment of debts and the mortgagee was not served with a citation in the proceeding to sell the land for payment of debts, the proceeding is defective and a motion made upon the judicial settlement of the account of the administrators to compel the purchaser to take title to the land will be denied, but the purchaser may not be granted affirmative relief.

PROCEEDING upon the settlement of the account of administratrices.

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Charles Swanson, for administratrices.

Herzfeld & Sweedler, for purchaser.

KETCHAM, S. The administratrices having accounted in a proceeding brought since September 1, 1914, and having therein sold real estate of their decedent for the payment of debts, now move that the purchaser in such sale take the title proffered by them.

The purchaser voluntarily appears in the accounting proceeding and resists this motion upon the ground that one of the heirs-at-law of the decedent has made a mortgage upon all the right, title and interest of the mortgagor in the premises so sold, and that the mortgagee therein named was not served with citation in the proceeding.

The affidavit filed in behalf of the purchaser alleges that the title is rejected upon the ground asserted by a title company that the mortgage was made by one of the heirs-at-law of the decedent. If from this scant suggestion it may be assumed that the mortgage was made after the death of the ancestor and before the service of the citation in the accounting, it must follow that the proceeding is defective and that the title now offered is bad.

The effect of section 2714 of the Code of Civil Procedure is that a mortgage made by an heir or devisee creates no incumbrance upon the title conveyed by the representative for the purpose of paying the debts of the decedent, if the letters upon the estate were granted upon a petition therefor presented within two years after the death.

Without resort to statute or authority, it must be plain, however, that the privity between the heir and his grantee is such that the latter should have equal right and opportunity with the heir to question the

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proceeding to sell the decedent's lands. The mortgagee takes a title which can only be defeated if it be determined that there are creditors and, in addition, that there is not sufficient personal estate with which to pay them.

He is certainly excluded from an obvious right if this determination be reached without citation to him. He is further concerned with all the practical means by which, if a sale must be had, it shall be so conducted as to secure a fair price and, if possible, a surplus for his benefit.

These considerations receive express recognition in the statute.

"If any person interested in such real estate, or in any question raised with reference to the mortgage, lease or sale thereof, is not a party to such judicial settlement, the surrogate, before proceeding further shall cause such person to be brought in by supplemental citation." Code Civ. Proc., § 2705.

The former Code protected the grantee or mortgagee of an heir or devisee, by provisions no more express and inevitable than those cited *supra* from the act now in force.

Former section 2777 contained language which is reproduced in present section 2714, without change material to the present dispute. It was also then provided that the petition for the sale of decedent's lands should set forth "the names * * * of all the heirs and devisees of the decedent, and also every other person claiming under them or either of them." Code Civ. Pro., former § 2752.

The surrogate was required to issue a citation according to the prayer of the petition, and if then it appeared "that any person claiming an interest in the property under an heir or devisee is not named in

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the petition the citation must be also directed to him." Code Civ. Pro., former § 2754.

It is not strange that under a system thus adequately established question did not arise as to the plain reading of the statute. It was, however, held that in a proceeding to sell real estate the judgment creditor of an heir or devisee was a person claiming under such heir or devisee within the meaning of former section 2754 and its accompanying sections. It was held that a purchaser in such proceeding was properly relieved from his purchase, when such judgment creditor was not a party thereto. *Matter of Townsend,* 203 N. Y. 522.

Chief Judge Cullen, in the opinion, said: "Though the lien of a judgment creditor on the real estate of his debtor is general and not specific, he has a substantial interest to protect in the proceeding. The effect of granting the application (for the sale of the lands) is to destroy his lien on the real estate."

Clearly the grounds for protecting the specific lien of a mortgagee would be more obvious, if necessary, than those which control the general lien of a judgment.

In *Richmond* v. *Freemans National Bank,* 86 App. Div. 152, the action was brought to restrain a sale made in a surrogate's proceeding for the sale of the decedent's lands, upon the ground that his devisee of the lands involved in the proceeding had mortgaged the same to a bank, which did not receive citation in the proceeding in the Surrogate's Court. No defect, however, was discovered by the court, which placed its decision solely upon the ground that the mortgage was made after the issuance and service of the citation, and the reflex effect of the argument of the court was that the mortgagee would have been entitled to notice and the proceeding would have been defective if the

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mortgage had preceded the issuance of process from the Surrogate's Court.

In *Griswold* v. *McDonald,* 81 Misc. Rep. 376, the proceeding in the Surrogate's Court to sell decedent's land for the payment of debts was questioned, upon the ground that the petition therein alleged the existence of a mortgage made by one of the heirs of the decedent and that the mortgagee therein was not cited. It appeared that for three months before the time when the allegation of the mortgage was made, the lien thereof had been released by payment, pursuant to an order made in an action.

Reciting this fact, the court says: "It may be inferred that, before citation issued, that fact (of payment) became known to the surrogate, and the alleged lienor was not cited because he was not a necessary party and had no right to citation."

The reflex of this language is clear, that a defect would have been declared by the court if in fact at the time when the citation issued there was an existing mortgage from the heir-at-law.

The proposition which controls this motion is well stated by Mr. Noble, the only author who has ever written a work upon this subject, in his Disposition of a Decedent's Real Estate for the Payment of Debts. He says (at p. 84): "But the proposition is fundamental that a person cannot be deprived of his property without due process of law; and this includes an opportunity to be heard afforded by some notice, actual or constructive (*Rockwell* v. *Nearing,* 35 N. Y. 302; *Campbell* v. *Evans,* 45 N. Y. 356; *Happy* v. *Mosher,* 48 N. Y. 313).

"It is therefore of grave importance that each person, who has acquired any interest or right in the real property upon or after the decedent's death, be named or described in the petition; for if such a person be not

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duly cited, his interest will not be affected by any disposition of the real property made pursuant to the decree (*Bloom* v. *Burdick*, 1 Hill, 130; *Wilson* v. *White*, 109 N. Y. 59; *Matter of John's Estate*, 18 Supp. 172)."

The motion must be denied. The prayer in the affidavit of the purchaser for affirmative relief cannot be considered upon this application.

Decreed accordingly.

ALICE M. WHITE, Plaintiff, *v.* MAX S. GRIFFENHAGEN, Defendant.

(City Court of the City of New York, Trial Term, April, 1916.)

Fees — of sheriff in collecting from judgment debtor — supplementary proceedings — Code Civ. Pro., § 3307.

Actions — commencement of — by assignee of judgment creditor — failure to notify defendant of title — when complaint dismissed.

A sheriff in collecting from a judgment debtor the sum set forth in a warrant issued against him in proceedings supplementary to an execution, and under which he was arrested, acts under an attachment for the payment of money (Judiciary Law, § 762) and is entitled to deduct his fees or poundage from the amount collected as provided by section 3307 of the Code of Civil Procedure.

Where in an action by the assignee of the judgment creditor to recover the amount collected by the sheriff it appears that plaintiff failed to notify defendant of her title to, or her interest in, the fund and without a demand for payment commenced the action, the complaint must be dismissed.

ACTION to recover an amount collected by the defendant, as sheriff, under a warrant issued out of this court against a debtor in proceedings supplementary to execution.

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L. M. Berkeley, for plaintiff.

Abraham S. Gilbert, for defendant.

LA FETRA, J. This action is brought by the plaintiff, the assignee of L. M. Berkeley, to recover an amount collected by the defendant, as sheriff, under a warrant issued out of this court against a debtor in proceedings supplementary to execution, wherein the plaintiff's assignor was the petitioner. The warrant directed the sheriff to take and hold the debtor in custody until he pay the sum or until he was discharged according to law. The sheriff arrested the debtor, who paid the amount set forth in the writ, with interest to the date of said payment, which is the amount now sought to be recovered. Immediately thereafter he tendered to plaintiff's assignor the said sum, less his fees, which was refused. Thereafter the petitioner assigned his claim to the plaintiff. The plaintiff failed to notify the sheriff of her title to or interest in the fund, and without a prior demand by her for payment commenced this action. The sheriff was entitled to deduct his fees or poundage from the amount collected. Code Civ. Pro., § 3307. He was acting under an attachment for the payment of money. Judiciary Law, § 762. His poundage fees were included in the fine imposed, which was to be paid to the aggrieved party under the direction of the court. Judiciary Law, § 773. In *Doyle* v. *Doyle,* 4 Civ. Pro. 265, 269, the court said: "In the case like the present the law assumes that the expenses of the plaintiff have been covered by the fine." So, in the absence of a specific direction in the warrant, the sheriff was entitled to deduct his fees from the amount collected in behalf of petitioner or to hold the fund until such a direction was made by the court. The defendant denied the material allegations of the

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complaint, interposed the defense of a tender made before the commencement of the action, proffered the sum, less his fees, in his plea, and kept it good upon the trial. Although the currency was neither deposited in court nor offered at the trial, no objection was interposed as to the form, and the assumption is full performance and legal tender. *Halpin* v. *Phenix Ins. Co.*, 118 N. Y. 165, 178; *Mela* v. *Geis*, 3 Civ. Pro. 152; *Becker* v. *Boon*, 61 N. Y. 317. Sections 772–774 apply to tenders made after an action has been commenced without a previous proffer and not to those under the common law, like the one in question. Accordingly, the complaint is dismissed.

Complaint dismissed.

GIOVANNI MARUCCORO, Plaintiff, *v.* E. D. AND A. F. CRONK, INC., Defendant.

(County Court, Oneida County, April, 1916.)

Jurisdiction — of City Court of Utica — to render judgment in excess of $200 — Laws 1882, chap. 103.

The legislation relating to the jurisdiction of the City Court of Utica, since its creation by chapter 103 of the Laws of 1882 and the acts amendatory thereof, considered, and held that said court has jurisdiction to render a judgment in excess of $200.

MOTION to set aside the judgment herein, and the transcript thereof, as filed and docketed in the office of the clerk of the county of Oneida, and staying all proceedings thereunder.

Guile & McMahon, for motion.

Lee & Dowling, opposed.

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Misc.] County Court, Oneida County, April, 1916.

HAZARD, J. This action originated in Justice's Court in the city of Utica. Plaintiff sued to recover $185 claimed to be due him from the defendant corporation as a result of some transaction in connection with an automobile. Defendant moved the case to the City Court of Utica, where by an amended answer it interposed a counterclaim for $308.29, following a general denial. Upon a trial by jury the defendant recovered a verdict for $288.29, besides costs. Plaintiff has failed to take an appeal and the time so to do has expired. However, he makes this motion, seeking relief upon the ground that the judgment entered is void and should not be permitted to stand or be enforced as a judgment of this court. This claim is founded upon the theory that the aggregate accounts exceed $400, and that, therefore, assuming the City Court to have only the same jurisdiction as a Justice's Court would have, it was without jurisdiction to proceed with the action; also upon the ground that (upon the same assumption) the City Court was without power to render a judgment in excess of $200 damages. It is perhaps unnecessary to consider the first part of the claim very seriously, especially as it is impossible to say how the jury arrived at their verdict, but apparently they disallowed the plaintiff's claim entirely. We thus come to the question of the power of that court to render a judgment for damages in excess of $200. It is provided by the Code, section 2949, that a Justice's Court cannot give judgment on a counterclaim for over $200, but it has been held that the court is not ousted of jurisdiction by a counterclaim exceeding $200 in amount. *Heigle* v. *Willis,* 50 Hun, 591. See, also, *Dale* v. *Prentice,* 126 App. Div. 127; *Bartlett* v. *Mugett,* 75 Hun, 292. Inasmuch as the judgment rendered exceeds $200, it was, under section 2949 of the Code, clearly beyond the power of the City

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Court of Utica to render such a judgment unless it has greater civil jurisdiction than is given to Justices' Courts. The City Court of Utica was founded by chapter 103, Laws of 1882. Section 4 of that act, dealing with the jurisdiction of the City Court, was amended by chapter 352 of the Laws of 1882, and again by chapter 154 of the Laws of 1889, and, so far as it affects the point at issue, reads as follows: "Section 4. Said city court shall have and possess the same powers and jurisdiction now possessed by courts of justices of the peace in the city of Utica, *and by the recorder's court of Utica.*" It thus appears that some power and jurisdiction was given to the City Court in excess of or in addition to that possessed by the ordinary Justices' Courts. Having reference to the law creating and conferring power upon the Recorder's Court of the city of Utica, we find it in chapter 319 of the Laws of 1844, which says that it shall be a court of record, and that "The said court shall have power to hear, try and determine according to law, all local actions arising in said city and not elsewhere." While the language which follows is not entirely explicit or clear it seems to be the fair purport of it to give to the Recorder's Court of Utica "the power and authority of the Courts of Common Pleas of the several counties of this State in suits commenced or prosecuted therein," etc. If, then, the City Court of Utica has the same powers and jurisdiction as the Recorder's Court had, and the Recorder's Court of the city of Utica had the same power and jurisdiction as the Court of Common Pleas, the case resolves itself down to a consideration of the question as to what was the extent of the authority and jurisdiction of the old court of Common Pleas of Oneida county. This question might seem to be an exceedingly simple one, but, after examining statutes and codes and cases industriously for

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some time, I have found it to be an obscure and difficult question. The courts of Common Pleas seem to have been the predecessors of the county courts, and appear to have been among the very earliest courts established in this state, dating back into the colonial times. In Smith's History of New York (Vol. 1, p. 311) we find this: "The Court of Common Pleas takes cognizance of all cases where the matter in demand is in value above five pounds. It is established by an ordinance of the Governor in council. The judges are ordinarily three, and hold their office during pleasure." In Laws of the Colony of New York, chapter 28, passed November 11, 1692, it is among other things provided that "There shall be kept and holden a Court of Common Pleas in each respective county * * * and such places in each respective county as said General Sessions of the Peace are to be kept, and to begin the next one after the session terminates, and then only to hold and continue for the space and time of two days after and no longer, and that there be a judge assisted by three Justices of the Peace * * * commissioned to hold the same Court of Pleas, three whereof to be a quorum, and that the several and respective Courts of Pleas hereby established shall have power and jurisdiction to hear, try and finally determine all actions, and all matters and things, * * * of what nature and kind whatsoever, so that the action or cause of action * * * doth not relate or concern title to land, provided always and it is hereby enacted that there shall not be any appeal * * * of any action or suit, or any judgment or execution that shall be determined in said Courts of Pleas to the value of 20 pounds or under." In chapter 10 of the Laws of New York, passed February 5, 1787, we find the following: "And be it further enacted by the authority aforesaid that the said courts of common pleas and mayors'

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courts shall be and hereby are respectively authorized and appointed to hear, try and determine according to law all actions real, personal and mixed, suits, quarrels, controversies and differences arising within the several and respective cities and counties for which the same are or shall be held." The next act which I am able to find was that passed April 5, 1813, which provides: "III. And be it further enacted, that the courts of common pleas of the several counties of this State shall be and hereby are authorized and appointed to hear, try and determine, according to law, all actions, real, personal and mixed, arising within the said counties respectively, and all transitory actions, although the same may not have arisen within the said counties respectively." In the Laws of 1823 we find chapter 47 dealing with the Courts of Common Pleas in the several counties of this state and providing that the judges of the County Courts "shall have power to hold the courts of common pleas and general sessions of the peace. That the said courts of common pleas and general sessions of the peace shall respectively have and exercise the same jurisdiction, power and authority, and proceed in like manner as they were by law authorized to do, on the 31st day of December last." An addition of the Revised Statutes of the state of New York, published in 1829 (Vol. 2, p. 208), contains apparently the substance of one or more of the acts above referred to, including: "to hear, try and determine, according to law, all local actions, arising within the county for which such court shall be held; and all transitory actions, although the same may not have arisen within such county: (2) to grant new trials: (3) to hear and determine appeals from Justices' Courts, in the uses and in the manner prescribed by law:" etc. In the Laws of 1836, chapter 526, we find a statute providing that in cases of appeal

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from Justice's Court to any Court of Common Pleas, "the judgment of such Court of Common Pleas shall be final and conclusive between the parties," but providing that the presiding judge of the Court of Common Pleas may in his discretion grant a certificate that in his opinion the case is a proper one to be carried to the Supreme Court, etc.

The Courts of Common Pleas, in counties other than New York, were abolished by the Constitution of 1846, to take effect the first Monday in July, 1847, and actions in the Courts of Common Pleas were transferred to the County Courts. The Court of Common Pleas in the city and county of New York was a court of considerable importance. Some of its decisions are to be found in the printed reports of Hilton and of Daly. That court was abolished by article 6, section 5, of the present Constitution, "from and after the first day of January, 1896," and actions pending therein and the judges of the court were transferred to the Supreme Court. Many decisions to be found in the reports above mentioned, and in many others, refer to the Court of Common Pleas of the city and county of New York, which seems to have been a more important court and to have had greater jurisdiction than the Courts of Common Pleas in other counties.

Coming to an examination of the cases bearing upon the subject of the amount of jurisdiction of the old Court of Common Pleas, while there are cases of about every conceivable other point as to its jurisdiction, I do not find any single case specifically deciding whether its jurisdiction was limited in amount or unlimited. In *Foot* v. *Stevens,* 17 Wend. 483, a case decided in 1837, it was said that the Court of Common Pleas was a court of general jurisdiction, and that "in point of subject matter its jurisdiction is equal to that of the Common Pleas in England, and that of this (the

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Supreme) Court." Judge Cowen adds: "True it (the Court of Common Pleas) is relatively inferior to and under the control of this court. * * * So is this court inferior to the court of errors." The case last quoted from was cited and followed in *Hart* v. *Seixas,* 21 Wend. 40–45. As a matter of fact all that was really decided in either of those cases was that inasmuch as the Court of Common Pleas was a court of general jurisdiction it might therefore *be presumed* that it had jurisdiction, in the absence of evidence to the contrary. On the other hand, in the case of *People ex rel. Armstrong* v. *Court of Common Pleas of the County of Oneida,* 20 Johns. 22, the court said: "Courts of Common Pleas are creatures of statute, and, in every sense, *inferior courts.*" Again, in *People* v. *Justice of Delaware Common Pleas,* 1 Johns. 183, the court said, speaking of the Courts of Common Pleas: "They are properly inferior courts and subject to the control of this court. * * * On the argument, they were compared to the Common Pleas in England, but the resemblance is in name only."

Whether the old Court of Common Pleas as it existed in this county was justly to be regarded as an inferior court or otherwise, I have been unable in any statute or case to find that its jurisdiction was limited as to *amount.* It was limited territorially in about the same way as the present County Courts are. An evidence of the fact that its jurisdiction was at least $500 is found in chapter 72 of the Laws of 1787, which, in paragraph II, provided "that no personal action or suit now pending or hereafter to be commenced in any Mayors' Court or Court of Common Pleas in this state, upon any bond or specialty, or for any other matter, cause or thing whatsoever, where the sum mentioned in the condition of such bond or specialty, with the interest thereon, or the matter or thing in demand, suit

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or controversy, *shall not exceed the sum of 100 pounds,* current money of this state, shall be stayed or removed into the Supreme Court, by any writ of habeas corpus, certiorari, or other writ of process whatsoever, other than writs of error or attaint." This seems to clearly indicate that the Court of Common Pleas had, at that time, jurisdiction at least to the amount of $500 and probably in excess of it; and it therefore seems to me to follow that, as applied to the case at bar, the City Court of Utica has authority to render judgment for an amount in excess of $200. I think this decision is consistent with the tenor of the City Court Act, which at section 4 (Laws of 1882, chap. 103) says: "Said city court shall have and possess the same powers and jurisdiction now possessed by courts of justices of the peace in the city of Utica, *and by the recorder's court of Utica.*" Had it been the intention of the legislature to confine the jurisdiction of the City Court to that of Justices' Courts, no reason is apparent why it should have added the words "and by the recorder's court of Utica." Those words seem clearly to indicate an intention to give to the City Court some jurisdiction in excess of that bestowed upon Justices' Courts. It is true that section 6 of the act provides that: "The proceedings, practice and pleadings, including appeals, shall be governed in all civil matters by the provisions of the Code of Civil Procedure relating to justice's courts," but that provision is not necessarily inconsistent with giving to the City Court at least some additional authority and jurisdiction. It is unnecessary as well as improper for me to decide the extent of the jurisdiction of the City Court of Utica, as to amount, but I have reached the conclusion that that court had power to render the judgment for $288.29 damages, which was rendered herein, and I so decide.

This decision renders it unnecessary to decide the

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points raised in the briefs and upon the argument as to the propriety of seeking relief by motion instead of by appeal. Undoubtedly, however, should the decision have been that the judgment rendered in the court below was in excess of the jurisdiction of the City Court, and therefore void, it would have been within the power of this court to have canceled the judgment and execution, so far as this court and its processes and records are concerned. *Daniels* v. *Southard,* 23 Misc. Rep. 235; 36 App. Div. 540; *Rowe* v. *Peckham,* 30 id. 175; Code Civ. Pro., § 348; *Wood* v. *Wesley,* 75 Misc. Rep. 521; *Matter of Automatic Chain Co.,* 64 id. 280; *Fallon* v. *Crocichia,* 52 id. 503. The further point is raised that inasmuch as this action was started in Justice's Court, where it was impossible to render a judgment for either party in excess of $200, that even if the City Court has greater jurisdiction than the Justice's Court, in view of the fact that the action was started in Justice's Court no greater judgment can be rendered in the City Court than might have been rendered in the action where it was originally commenced. I think the case of *Ludwig* v. *Minot,* 4 Daly, 481, is authority for a contra view. The facts in that case seem to be practically identical with those in the case at bar, viz.: A removal from a court of limited jurisdiction to one having a greater jurisdiction, and the judgment rendered in the latter court in excess of the jurisdiction of the court in which the action was commenced. In this case the court said: "In the administration of justice, as authorized by its constitutional powers, it had not two courses, one for cases brought into it by due process of removal from inferior courts and another for those originally commenced therein. The removal of the cause into this court attached to it all the incidents of jurisdiction appertaining to this court."

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Incidentally, it is to be observed that in the case last cited the judgment rendered was for $260, but the case was in the Court of Common Pleas of the city and county of New York, a court which may possibly, at least in some respects, have had some jurisdiction superior to that of the courts of Common Pleas in other counties. However, we find the case of *Van Lew* v. *King*, 3 Cow. 375, a Common Pleas case decided in 1824, and *not* in the Common Pleas, New York city and county. In that case the plaintiff claimed $250, but actually recovered only $38.33. That case has some bearing on the one at bar as showing, apparently, that the Court of Common Pleas had jurisdiction in excess of $200. The motion must be denied.

Motion denied.

JAMES BROWN and MARY A. BROWN, Plaintiffs, *v.* EDWARD J. QUINLAN, EDWIN B. WHEELER and WILLARD H. SWEET, Defendants.

(County Court, Rensselaer County, April, 1916.)

Jurisdiction — of County Court — pleading — when plaintiff entitled to equitable relief — actions.

An action to recover $1,150 for damages to real property is within the jurisdiction of a County Court and that the complaint alleges facts which, if proved, might entitle plaintiff to equitable relief does not render the complaint subject to a demurrer.

DEMURRER to complaint.

Ransom H. Gillet, for plaintiffs.

Akin & Keenan, for defendants.

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RUSSELL, J. The complaint in this action presents the customary allegations for damages to real property. The prayer, however, asks for damages in the sum of $1,150 and also for an order of injunction. There is no question but that this court has jurisdiction of the subject matter relating to damages.

Article 6, section 14, of the Constitution of the state of New York: "* * * County Courts shall have the powers and jurisdiction they now possess, and also original jurisdiction in actions for the recovery of money only, where the defendants reside in the county, and in which the complaint demands judgment for a sum not exceeding two thousand dollars."

The allegations of the complaint bear mainly upon facts relating to damages.

The complaint also alleges facts which if proved might entitle the plaintiff to equitable relief.

The relief demanded does not necessarily characterize the action to such an extent that a general demurrer should be sustained where the allegations in the complaint constitute a cause of action for damages and the allegations for equitable relief appear to be incidental thereto. 46 Hun, 597; 49 N. Y. 626.

The court having jurisdiction of the main subject of the action which is for damages, and the other relief asked for in the complaint being incidental thereto and of an equitable character, the demurrer is overruled.

Demurrer overruled.

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Misc.] County Court, Albany County, April, 1916.

HARRY LEIBMAN, Respondent, v. CHARLES D. DEAN, Appellant.

(County Court, Albany County, April, 1916.)

Contracts — in writing — when oral agreement without consideration.

Where plaintiff and another in writing agreed with defendant to do the work of laying brick in the construction of a certain building, an oral agreement subsequently made between plaintiff and defendant to do the same work is without consideration and no recovery can be had thereon.

APPEAL from a judgment of the City Court of Albany, rendered in favor of plaintiff.

Lester W. Bloch, for appellant.

William Goldberg, for respondent.

ADDINGTON, J. This is an appeal by the defendant from a judgment of the City Court of Albany, in favor of the plaintiff, for $144.84.

The action is brought by plaintiff to recover a balance due on an alleged contract made between the parties on the 30th day of December, 1913, for laying brick on premises in the city of Albany at five dollars and fifty cents per 1,000.

As to the making of the alleged contract the plaintiff testified as follows: "Q. I want you to tell us about the conversation you had with Dean, not the first time you met him, but after you were around on the job? A. I had a conversation with him the next week, when I was working there. He ought to give me my money on Saturday afternoon and he didn't give it to me, he gave it to Mr. Boakes, twenty-eight dollars. Then I told Mr. Dean I would not work on the job if he gave the money to Mr. Boakes, because I hired the help

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and I want him to pay me, I couldn't pay the help. I said 'I want you shall make a new agreement, you shall pay me every week so I shall have enough to pay the men and I have wages for myself.' He shall pay me the money to pay the men and the profit will be when the job is completed. Q. What did he say? A. Mr. Dean said 'All right, I am satisfied to pay you every week, your men and yourself,' and I said 'All right, I will go to work.' I told him Mr. Boakes should have nothing to do with it, because Boakes said—. Q. Tell the talk you had, between you and Mr. Dean? A. That was the talk, he had to pay me enough to pay the men and myself, and the profit will be left from $5.50 a thousand will pay me when the job is completed, and he was satisfied. Q. What did he say? A. He said 'All right, I will pay you every week enough to pay the men and your wages, and the profit you will get when the job is completed.' Q. After you had this arrangement you went to work? A. Yes. Q. When did the talk you told us about take place? A. I was working on the job two weeks. Q. What day was it on? A. Saturday afternoon. Q. Where did the conversation take place? A. He started to go down the block and I went after him and spoke to him down the street. Q. Was anybody present besides you and Mr. Dean? A. Nobody was there. Q. Before this talk took place Dean had given twenty-eight dollars to Boakes? A. Yes. Q. That was the occasion of your speaking to Dean? A. Yes, that's why I spoke to him. Q. Before this time you had worked on the job two weeks? A. Yes."

This conversation is substantially denied by the defendant.

It is undisputed that before this conversation, as testified to by plaintiff, the parties to this action and one C. Boakes entered into a written agreement, which

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was offered and received in evidence, by and under which the plaintiff and Boakes agreed with the defendant to lay brick on the premises in question, including the brick which the plaintiff claims he laid in pursuance of the oral agreement to which he testified as above set forth.

The written agreement is as follows:

"ALBANY, *Dec. 22nd,* 1913.

"This sub-contract between C. D. Dean and C. Boakes & Harry Leibmann for laying the brick work on Cor. of Jackson St. and Second Ave., in the City of Albany, N. Y. Work to be done in accordance with plans. Said work to be done in a workmanlike manner, and to include all brick work on said job.

"The said C. Boakes & Harry Leibmann to do all the labor of mixing mortar and laying brick, putting up their own scaffolds.

"For the sum of $5.50 per thousand.

"The amount of brick to be determined by the number of loads hauled on the job.

"The work to be done as rapidly as the weather will permit. Payments to be made in accordance with general contract as work progresses and 90% of work done, balance at completion of job, which will be at the completion of fire walls after roof timbers have been placed.

"Signed by C. D. DEAN."

It is apparent that the reason the plaintiff assumed to make a new contract with the defendant was because a payment on account of the work done was made by the defendant to Boakes, one of the parties to the written contract, and he, plaintiff, wanted the payments made to him.

In view of this written agreement between the parties to this action and Boakes, even assuming that the

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oral agreement which plaintiff claims he made with the defendant on the thirtieth day of December was actually made, it seems clear under all the authorities that the plaintiff cannot recover in this action, as there was no consideration for this latter agreement, as he was already bound to do the work for which he seeks to recover, by the written agreement above set forth.

The leading case on this proposition, and which has been followed, applied, distinguished and cited in innumerable cases to the present time, is *Vanderbilt* v. *Schreyer*, 91 N. Y. 392, which is clearly decisive of this case.

"In case a claim arises in favor of A. and B., against C., out of a contract entered into by the three, to which claim by the contract A. has the prior and B. the subsequent right, C. & B. cannot without the consent of A., effect an accord and satisfaction which will cut off the right of A." *Hathaway* v. *O. Ins. Co.*, 134 N. Y. 409, 412, and cases cited.

"The plaintiff did that only which he was bound to do, and that which a court of equity would have compelled him to do, and the corporation received only that to which it was legally entitled. The performance of an act which the party is under a legal obligation to perform cannot constitute a consideration for a new contract." *Robinson* v. *Jewett*, 116 N. Y. 40, 53, and cases cited.

If there is any sum of money due on account of the work performed under the written contract, of course, the rights of the parties can be determined in an action brought on that contract.

For the reasons stated the judgment of the City Court of Albany in favor of plaintiff is reversed, with costs.

Judgment reversed, with costs.

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Misc.] County Court, Nassau County, April, 1916.

TITLE GUARANTEE AND TRUST COMPANY, Respondent, *v.* ALBIN N. JOHNSON, Appellant.

(County Court, Nassau County, April, 1916.)

Summons — when void — Code Civ. Pro., § 3135.

A summons issued by a justice of the peace with a blank therein either as to the date or otherwise is void under section 3135 of the Code of Civil Procedure which requires that such a summons must be "entirely filled up" and delivered to an officer to be executed.

APPEAL from a judgment rendered by default in favor of the plaintiff against the defendant by a justice of the peace of the town of North Hempstead.

Albin N. Johnson, for appellant.

Arthur P. Hilton, for respondent.

NIEMANN, J. (1) A reversal of the judgment is asked for on the ground that the summons is void because it is not entirely filled up — that there are blanks in it as to the year. The appellant claims two omissions in this regard: *First,* that the date of the year at the bottom of the summons is not filled in as to the last figure, namely 5, so that it is left to read "Dated at Mineola, in the Town of North Hempstead, this 15 day of November, 191 ." I find from an inspection of the summons that the figure 5 is added to the 191. The appellant claims that this is merely an irregular sweep of the pen in the place where such figure ought to be, but an inspection will disclose that the figure is a 5, evidently written with very thin ink and a very light hand. *Second.* That the summons is made returnable on the "27 day of Nov." at nine o'clock in the

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forenoon. An inspection of the summons shows that there is a printed dotted line for the insertion of the date, on which the figures 27 are written, and that there is a printed dotted line for the month and year upon which the abbreviation Nov. is written, leaving the rest of the line and space blank.

Section 3135 of the Code of Civil Procedure provides as follows: "A mandate, issued by a justice of the peace, must be signed by him, and may be without seal. It must be entirely filled up, at the time when it is delivered to an officer to be executed, so as to have no blank, either in the date thereof or otherwise; except that there may be a blank in a subpoena for the name of any or all of the witnesses. A mandate, issued and delivered to an officer to be executed, contrary to this section, is void."

The general rule as to filling blanks in process is stated in 20 Encyclopaedia of Pleading and Practice, 1109, as follows: " Process should be complete when issued and delivered for service. It is sometimes expressly so provided by statute, and a noncompliance with such provision has been held to render the process void. So, for the purpose of preventing abuse of process, certain officers have been declared by statute incompetent to fill blanks." Citing *Craighead* v. *Martin,* 25 Minn. 41; *Seurer* v. *Horst,* 31 id. 479. See also *Phinney* v. *Donahue,* 67 Iowa, 192; *Hannaman* v. *Muckle,* 20 Civ. Pro. 296. In construing said section 3135 of the Code, Mr. Justice Putnam, writing for the court, in the case of *Richmond Sales Co.* v. *Morris,* 157 App. Div. 374, 375, says: " The date, however, seems essential, as any mandate issued from a justice of the peace must be completed when delivered for execution. It is not, then, to have any blank left to be filled in, ' either in the *date* thereof or otherwise.' "

From this construction of the statute it follows that

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because of the defects pointed out in the summons, *i. e.*, that it was not "entirely filled up," and that there was a blank as to the year, which was a part of the date, and if not a part of the date, is fully covered by the dragnet words of said section "or otherwise," the summons was, as declared in said section, "void," and the justice was without jurisdiction to render the judgment.

Judge Collin, in the course of the prevailing opinion written by him in the case of *People ex rel. Lawton* v. *Snell,* 216 N. Y. 527, says (p. 534): "* * * compliance with the commands of a mandatory statute, is a condition precedent to the validity of an act or determination under it. The mode or way in which the act shall be done or the determination reached prescribed by it must be strictly pursued, otherwise the act or the determination will be void."

The word "must" as used in the section under consideration was necessarily mandatory and imperative, and intended to be made so by the legislature, because the section closes with the declaration that a failure to observe the command renders the process "void." The summons being void, it was as though no case was before the justice. He could not take cognizance of the subject-matter of the action. Certainly not in the absence of the defendant. If it should be claimed that there could be a waiver of these defects by appearance and an amendment, such a situation is not before the court upon this appeal, and I will therefore not pass upon this question.

(2) The cases of *Bradbury* v. *Van Nostrand,* 45 Barb. 194; *Arnold* v. *Maltby,* 4 Den. 498; *Griffin* v. *Jackson,* 36 N. Y. St. Rep. 110, and *Lenham Mercantile Co.* v. *Herke,* 55 Misc. Rep. 310, cited by the learned counsel for the respondent, are not authorities calling for a different disposition of the question under con-

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sideration. In the case of *Bradbury* v. *Van Nostrand*, the summons was erroneously dated and was amended on the return day upon the appearance of the defendant.

In the case of *Arnold* v. *Maltby*, the court held that a mistake in the date was amendable by the justice.

The *Griffin* and *Lenham* cases were cases where there was a clerical error between the original summons and the copy served, which the court held to be amendable. In the case at bar the defect was in the original itself, rendering it void.

The defect in the summons in this case did not constitute a mere irregularity but a nullity.

The defendant had a right to treat the summons as void because of the express declaration in the statute that a mandate issued by a justice with a blank therein either as to the date or otherwise is void.

The judgment appealed from must be reversed, with costs.

Judgment reversed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* JOHN OSTROSKY, Appellant.

(County Court, Nassau County, April, 1916.)

Criminal law — arrest by private person without a warrant — delivery to peace officer — information laid after arrest charging petit larceny — Penal Law, §§ 1290, 1298.

A private person who without a warrant has arrested another for a crime committed in his presence may deliver him to a peace officer whose right to take the offender into custody without a warrant is a continuation and part of the original right to make the arrest without a warrant.

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Where in such case the offender was brought before a magistrate it is unnecessary for him to make out or issue a formal warrant, the only office of which is to authorize and direct the arrest of one charged with having committed a crime.

Where one arrested without a warrant is taken before a magistrate who prepares an information upon which the defendant is arraigned and upon a plea of not guilty goes to trial and the evidence is sufficient to establish his guilt the judgment of conviction will be affirmed as against the contention that the magistrate acquired no jurisdiction because at the time defendant was taken before the magistrate no information had been made or filed; even if defendant's arrest had been illegal the magistrate acquired jurisdiction when the information was taken and defendant was arraigned to answer the charge contained therein.

An information accusing defendant of having "unlawfully, willfully and feloniously taken, stolen and carried away" a certain number of chickens in violation of sections 1290 and 1298 of the Penal Law held to have the same effect as if said sections had been fully incorporated in the information.

APPEAL from a judgment of Walter R. Jones, a justice of the peace, sitting as a Court of Special Sessions in the town of Hempstead, Nassau county, N. Y., convicting the defendant of petit larceny and sentencing him to six months' imprisonment in the New York County Penitentiary.

Clock & Seaman (Harry G. Clock, of counsel), for appellant.

Lewis J. Smith, district attorney of Nassau county (Charles J. Wood, assistant district attorney), for respondent.

NIEMANN, J. On January 5, 1916, about five o'clock P. M., William R. Meyer, the complaining witness, locked up his chickens in the coop, and closed and

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locked the door of the chicken yard. About nine o'clock that evening a noise was heard coming from the chicken yard. Two young ladies who were in the house opened a window and looked down in the chicken yard and saw a man going out of the chicken yard, over the fence. A man named Seel also looked out of the window and these persons saw the man and identified him as the defendant. The complainant ran out of the house into the chicken yard and saw several of his chickens in the yard dead, or dying, with their necks wrung. The doors of the chicken yard and coop were open. He saw a man in the chicken yard and this man ran toward the back fence of the yard. Meyer ran out of the yard into the street and was joined by Seel and they both ran after the man, who was the defendant. Two other persons came up the street and saw the defendant. One of them saw him as he was jumping the fence and the other saw him just after he had jumped over the fence and was starting to run from the other side. They all gave chase — others joining in the pursuit. The defendant was seen to stop and wash his hands at a little brook back of the fence. He was finally caught and held by the witness Seel and others until an officer came. He was taken back to Meyer's yard, and from there to the lockup and kept there over night. The following morning he was taken before Justice Jones who took the information and deposition of the complaining witness Meyer, and the deposition of the witness Seel, under oath. The justice read the information and depositions to the defendant, arraigned him, and informed him of his rights as required by the statute. The defendant plead not guilty and was remanded for trial. His trial and conviction followed.

A reading of the record satisfies me that the evidence was sufficient to establish the commission of the

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offense by the defendant, but the defendant attacks the validity of the judgment upon several grounds which I will consider in the order in which they are stated.

First, the defendant claims that his arrest was illegal because he was arrested by an officer without a warrant for a misdemeanor not committed in his presence; *second,* that it was illegal, also, because no warrant for his arrest was issued; *third,* that the justice acquired no jurisdiction, because at the time the defendant was taken before the justice no information had been made or filed; *fourth,* that the information which was taken by the justice when the defendant was arraigned before him is fatally defective because it fails to charge that the taking was " with the intent to deprive or defraud the true owner of his property; " and *fifth,* that the information does not charge, and the evidence does not establish, the commission of the crime of larceny.

(1) There is no right to arrest without a warrant for a past misdemeanor. *People* v. *Adler,* 3 Park. 249; *People ex rel. Kingsley* v. *Pratt,* 22 Hun, 300. But the complainant Meyer and the witness Seel had a lawful right to arrest the defendant under the circumstances shown by the evidence. Section 183 of the Code of Criminal Procedure provides that "A private person may arrest another: For a crime committed or attempted in his presence." The police officer had the right to receive the defendant from the hands of said persons who had arrested him.

Section 185 of the said Code provides that "A private person, who has arrested another for the commission of a crime, must, without unnecessary delay, take him before a magistrate, or deliver him to a peace officer."

The latter part of said section was complied with

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by the delivery of the person of the defendant to the peace officer. The officer had a right to take the defendant into his custody then and there without a warrant. In fact, it was the duty of said officer to take the defendant into his custody in order to prevent his escape. The defendant was caught as he was attempting to escape and the private persons who had arrested him had a right to relieve themselves of the further custody of the prisoner either by taking him before a magistrate or by delivering him to a peace officer. It was the duty of the peace officer to take him out of their custody into his custody. If he had refused to do so the defendant could have carried out his attempt to escape and public justice might have been frustrated. The officer would have been derelict in his duty if under the circumstances he had refused to take the defendant into his custody. He did not require the authority of a warrant, because the statute above quoted expressly provides for the transfer of a person who has been arrested without a warrant by a private person to a peace officer. The right of the officer to receive and take the prisoner without a warrant was a continuation and part of the original right to arrest him without a warrant.

(2) As the defendant was brought before the magistrate upon an arrest the circumstances of which made a warrant unnecessary and took the place of a warrant, it was unnecessary that the justice make out or issue a formal warrant against the defendant. The office of a warrant is to authorize and direct the arrest of a person who has committed a crime. But the requirement of a warrant falls away entirely when the crime is committed in the presence of a person who makes the arrest; so also when the person arrested is received by a peace officer from the person who made such arrest. *People ex rel. Gunn* v. *Webster*, 75 Hun,

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278; *People* v. *Mulkins,* 25 Misc. Rep. 599; *People* v. *Burns,* 19 id. 681.

(3) The existence of an information at the time the defendant was brought before the justice was not necessary to give the justice jurisdiction of the defendant. From the very nature of the matter, no preliminary information can be in existence in a case where a man is arrested in the act of committing a crime and is then brought before a magistrate. To require an information under such circumstances would be to nullify the statutory power to arrest criminals when caught in the act, because the absence of an information would prevent the justice from taking any cognizance of the matter, and the defendant would have to be allowed to go free. There is no more reason for requiring in advance an information in order to give the justice jurisdiction in such a case than the preliminary issuance of a warrant. *People ex rel. Gunn* v. *Webster, supra.* The object of an information is to inform the defendant of the specific charge against him. That was done in this case. An information was duly prepared by the justice and the defendant was thereupon arraigned and interposed a plea of not guilty. That is, the defendant was legally charged with the commission of a crime, which he put in issue by his plea of not guilty. Thereupon he had a trial.

The office of an information, *i. e.,* to inform him of the specific charge against him, was fully performed. The information was necessary to support the charge upon which he was tried, but it was not necessary to support or warrant his arrest. He was as fully protected in his rights, so far as the trial of the issue as to his guilt or innocence was concerned, by the filing of the information at the time he was first brought before the justice as if the information had been in

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existence before his arrest. *People* v. *Angie,* 74 App. Div. 539; *People ex rel. Farley* v. *Crane,* 94 id. 397.

Furthermore, even if the defendant's arrest had been illegal, the justice acquired jurisdiction of the defendant when the information was taken and filed and he was arraigned before him to answer the charge contained in said information. *People* v. *Iverson,* 46 App. Div. 301; *People* v. *Jeratino,* 62 Misc. Rep. 587; *People* v. *Eberspacher,* 79 Hun, 410; *People ex rel. Edwards* v. *Warden,* 37 Misc. Rep. 635; *People* v. *Cuatt,* 70 id. 453; *People* v. *Harmer,* 75 id. 399, 400. The sole question is whether the court had jurisdiction of the offense charged. If that is shown the fact that the defendant was brought before the court upon an illegal arrest would not affect the validity of his trial and conviction.

The case of *People ex rel. Lawton* v. *Snell,* 168 App. Div. 410; revd., 216 N. Y. 527, is not an authority against the rule repeatedly laid down that irregularity or illegality in the bringing of a defendant before a magistrate does not affect the magistrate's authority to entertain the case. The relator was arrested in Schoharie county under a warrant issued in Rensselaer county in bastardy proceedings. The reversal in the Court of Appeals was based upon the ground that the relator had a right to be taken before a magistrate in Schoharie county to give him an opportunity to give a bond before being taken before the Rensselaer county magistrate for trial, and that the taking of the relator before the Schoharie county magistrate was a condition precedent by virtue of the statutory requirements in that particular kind of proceeding.

But the doctrine laid down in the case of *People* v. *Eberspacher, supra,* was fully upheld by all the judges writing, and Judge Collin who wrote the majority opinion for reversal was particular to say (p. 535):

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"The reasons for reversal are not opposed, at any point, to those for the decision in *People* v. *Eberspacher,* 79 Hun, 410. The mere illegality of the act of the officer in refusing to take the relator before the magistrate of Schoharie county, or in taking him directly before the police justice is not the basis for our conclusion. The basis for it is that the taking of the relator before the Schoharie county magistrate was a condition precedent, by virtue of the statutory requirements, to the making of the inquiry and the order of filiation, and was not fulfilled. This feature was lacking in the *Eberspacher* case."

This case settles more fully and completely than ever the rule that the court has jurisdiction to proceed against a defendant upon information made and filed, although he was illegally brought before the court.

(4) The claim of the learned counsel for the defendant that the information is fatally defective, is, in my opinion, untenable. An information, though inartificially drawn, is legally sufficient if it contains a substantial statement showing the commission of the particular offense charged. *People* v. *James,* 11 App. Div. 607; *People* v. *Pillion,* 78 Hun, 74; *People* v. *Payne,* 71 Misc. Rep. 72. The information in the case at bar meets this requirement. It alleges: "That on January 5, 1916, at the said village and town of Hempstead, Nassau county, New York, divers goods, chattels and property of deponent of the value of less than $50, to wit: of the value of $10, of the kind, description and value as follows, to wit: 10 chickens, 2 roosters and 8 hens were unlawfully, wilfully and feloniously taken, stolen and carried away from the possession of the deponent by one John Ostrosky entering the premises occupied by deponent in the said village and town of Hempstead, Nassau county, New York, and going into the chicken yard through a gate and taking from

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the chicken house in said yard the said 10 chickens and pulling the head off of one of said chickens and twisting and wringing the necks of the others causing them to die, and attempting to take said chickens from said premises, but was prevented by being discovered in the act, all of which was wilful, unlawful and in violation of sections 1290 and 1298 of the Penal Law of the State of New York."

I am of the opinion that the statement in the information that the acts charged were in violation of sections 1290 and 1298 had the same effect as if the said sections had been fully incorporated in the information.

The information itself accuses him of having "unlawfully, wilfully and feloniously taken, stolen and carried away" the property, and the further statement in said information that he did this in violation of said sections was tantamount to saying that he did so with the intent to deprive and defraud the true owner of his property.

The statement in the information that the defendant feloniously took, stole and carried away the property in question, was in itself sufficient without incorporating in the information a reference to the said sections. The use of the word "feloniously" was a sufficient allegation of the intent necessary to constitute the crime. *Phelps* v. *People*, 72 N. Y. 335, 337, 350; *People* v. *Conroy*, 97 id. 68; *People* v. *Willett*, 102 id. 251, 253, 254; *People* v. *Moore*, 37 Hun, 84, 93; *People* v. *Mosier*, 73 App. Div. 5.

(5) The fact that the chickens were not taken away from the premises by the defendant is not a defense to the charge of larceny. There was a sufficient asportation when the chickens were taken out of the coop. The slightest removal of the property from the place where it was before, with an intent to steal it, is a

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sufficient asportation. *Harrison* v. *People,* 50 N. Y. 518; *People* v. *Mills,* 178 id. 274, 286.

Possession by the thief, no matter how brief in point of time, completes the crime of larceny.

The learned counsel for the defendant says that the information at most charges an attempt to commit the crime of larceny, because it reads in part as follows: "And attempting to take said chickens from said premises but was prevented by being discovered in the act; " that is, the chickens were not carried away.

In the case of *Harrison* v. *People, supra,* the defendant was tried for larceny. The evidence showed that he " put his hand into the coat pocket of complainant, seized the pocketbook of the latter, containing money and securities, and lifted it about three inches from the bottom of the pocket. Held, a sufficient carrying away to constitute larceny."

There are many cases in the books, where the least removing of the property and the most temporary possession thereof was held to amount to asportation. A number of such instances are given in the case of *Harrison* v. *People, supra,* viz.: Snatching a diamond earring from a lady's ear, but dropping it and leaving it in her hair. *Lapier's Case,* 1 Leach, 320. Lifting a pocketbook from out the pocket but dropping back again. *Rex* v. *Thompson,* 1 Moody Cr. Cas. 78. Larceny of a watch: Defendant took a watch out of owner's waistcoat pocket and forcibly drew chain through buttonhole of waistcoat. Point of key was caught on button of another hole and was thereby suspended. Defendant's hand was seized by owner's wife. It was argued that this was an attempt only. The court held that as the chain had been removed from the buttonhole, the felony was complete. " The watch was temporarily, though for a moment, in his possession, it was said." *Regina* v. *Simpson,* Dearsly

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Cr. Cas. 421. Also the following cases may be cited: Removing a parcel from one end of a wagon to another. *Coslet's Case,* 1 Leach, 236. Lifting a sword partly out of the scabbard. *Rex* v. *Walsh,* 2 Russ. Cr. 153. Causing a horse to be led out of a stable to mount. *Rex* v. *Pitman,* 2 C. & P. 423. A postman's putting a letter in his pocket instead of delivering or returning it. *R.* v. *Poynton,* L. & C. 247. Removing a drawer of money from a safe and leaving it outside. *State* v. *Green,* 81 N. C. 560. Removing wheat from owner's garner, in a mill, into defendant's adjoining garner. *State* v. *Craige,* 89 N. C. 475; 45 Am. Rep. 298.

It follows that the judgment of conviction must be affirmed.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* CELIA DIAMOND, EDWARD L. DIAMOND, SAMUEL BARKIN and SAMUEL SIMON, Defendants.

(County Court, Kings County, April, 1916.)

Criminal law — indictment for manslaughter — violation of Labor Law — criminal responsibility of owner of tenant factory for death of one as result of fire therein — omission to discharge duty under Labor Law.

An owner of a "tenant factory" within the meaning of the Labor Law who may not personally participate in the violation of said statute or who may be without knowledge of its violation by his or her agent may be guilty of a misdemeanor in failing to affirmatively see that the provisions of the statute are complied with in respect to his or her property.

An indictment charging manslaughter in the first degree and manslaughter in the second degree in separate counts against the owner of a tenant factory within the meaning of the Labor Law and his agent in charge of said building having the supervision, direction and control thereof, in which said building a fire occurred, after alleging that an individual was "burned,

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suffocated and died as a result of the injuries thus received," sets forth that the injuries and death were due to acts of omission of defendants and sufficiently alleges in what respect defendants failed in the discharge of their duty under the Labor Law to decedent, and defendants are thereby apprised of the particular acts of omission with which they are charged when read in connection with the preceding allegations in said count of the indictment for manslaughter in the first degree, a demurrer to the indictment on the ground that it does not appear upon its face that either of the crimes is charged and that the facts stated do not constitute either of the crimes charged will be overruled.

DEMURRERS to indictments.

James C. Cropsey, district attorney, for People.

Martin T. Manton, for defendants.

DIKE, J. The defendants have been duly indicted by a grand jury of the county of Kings, charged with the offenses of manslaughter in the first degree and manslaughter in the second degree, in three separate indictments. Each of these indictments is practically identical with the others, except as regards the name of a different deceased person in each indictment. These indictments grew out of a fire occurring in the factory building at 285 North Sixth street, in the borough of Brooklyn, on November 6, 1915. The defendants Celia Diamond and Edward L. Diamond alone have interposed demurrers and upon these grounds: *First.* That it does not appear upon the face of the indictments that the crime of manslaughter in the first degree and manslaughter in the second degree is alleged or charged in said indictment. *Second.* That the facts stated in said indictment do not constitute the crime of manslaughter in the first degree and manslaughter in the second degree.

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The indictments must be analyzed with a view to determining whether they conform to section 275 of the Code of Criminal Procedure. "The indictment must contain: A plain and concise statement of the act constituting the crime, without any unnecessary repetition."

It is fundamental that the defendants should be apprised by the indictment of the charge against them; that the indictment must concisely state both the crime and the acts constituting it. The obvious object is that the charge should be set forth with such certainty and sufficiency as to enable the defendant to prepare for trial, and to protect them against a second prosecution for the same offense. Otherwise, a demurrer should be upheld. The first count in the indictment charges manslaughter in the first degree. The section of the Penal Law defining the offense as herein charged is as follows:

"§ 1050. Such homicide is manslaughter in the first degree, when committed without a design to effect death; (1) By a person engaged in committing, or attempting to commit, a misdemeanor, affecting the person or property, either of the person killed, or of another."

The indictments describe the building as "five stories in height, separate parts of which were occupied and used by different persons, companies and corporations as tenants and some of which parts were used as factories and were factories within the meaning of the provisions of the Labor Law of the state of New York. It is further alleged in said indictments that the defendant Edward L. Diamond was the agent in charge of said building and property for the owner, the defendant Celia Diamond, and had and exercised supervision, direction and control thereover.

It is charged that the defendants caused death

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through a failure to comply with the provisions of the Labor Law. The premises in question may be clearly construed a " tenant factory " within the meaning of the Labor Law. By section 94 of the Labor Law, although not an occupant of the building, the owner is made responsible for its condition. " The owner, whether or not he is also one of the occupants, instead of the respective lessees or tenants, shall be responsible for the observance and punishable for the non-observance of the following provisions of this article, anything in any lease to the contrary notwithstanding, namely, the provisions of sections * * * 79, 79a, 79b, 79c, 83a, 83b * * *." Any such violations are made misdemeanors and are punishable as such by section 1275 of the Penal Law.

Counsel for the defendants urges that there is nowhere in the indictments a clear specification of *the* offense of which the prosecution accuses these defendants; that the indictments are defective in that they fail to allege all the acts constituting the crime. But in the case of a misdemeanor, under the authorities, it does not seem to me that it is essential that the misdemeanor offense should be pleaded with the same fullness and particularity when it is involved incidentally as a part of another offense as a felony, as would be necessary if it were the sole offense charged. *People* v. *Willett,* 102 N. Y. 251; *People* v. *Giblin,* 115 id. 196.

The indictment, after alleging that an individual was " burned, suffocated and died as a result of the injuries thus received," sets forth that the injuries and death were due to acts of omission of the defendants, stating several general particulars, and, finally, that the defendants failed to " keep unlocked, unbolted and unfastened all doors leading into and out of every factory in said building and every floor thereof while

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said employees were working therein and during working hours," and, finally, specifically alleging that the defendants "permitted and allowed the door at the head of the flight of stairs leading from the fourth floor of said building to the third floor thereof — this flight of stairs being a portion of the stairway above referred to — to be and remain locked, bolted and fastened during working hours, and while the employees were at work in said building." Certainly it seems to me that these allegations sufficiently set forth in what respect the defendants failed in the discharge of their duty under the law to the deceased, and it would certainly appear that the defendants are apprised thereby of the particular acts of omission with which they are charged when read with all the preceding allegations in this count.

In the admirable opinion of Judge O'Sullivan in the case of *People* v. *Harris*, 74 Misc. Rep. 353, which case is compelling authority to sustain the counts of these indictments, he says (at p. 359): "For the protection of employees the law has placed upon the employer an obligation to leave all doors leading to his factory unlocked during working hours. There is no question of the Legislature's intention when it declared that all doors shall open outwardly. A locked door opens neither inwardly nor outwardly. If any door leading to the factory was locked and bolted during working hours, the law was violated."

There is considerable discussion in the briefs, pro and con, regarding section 80 of the Labor Law. While it does appear that section 80 had been repealed, it also would appear that the provisions of that section had been continued and carried into section 79c of the Labor Law. As the indictments plead the offense in the language of section 79c, it would seem to me to be sufficient. *Engleheim* v. *Ill. Surety Co.*, 85 Misc. Rep.

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588. A reading of the Labor Law convinces me that the conduct of one charged as in this indictment may be simply that of *omission* on the part of an owner or agent to do a certain prescribed thing.

In respect to the charge of manslaughter while engaged in the commission of a public nuisance, it seems to me the case of *People* v. *Harris, supra,* would make the allegations of this indictment sufficient.

The argument that because the indictment fails to show criminal intent on the part of the defendants, they are insufficient, seems to me to be without merit. The case of *People* v. *Scanlon,* 132 App. Div. 528, relied upon, among others, to support this contention, can be clearly distinguished. There, an owner of an automobile, although riding in the car, was held guiltless of the crime of manslaughter when the chauffeur, through a collision, caused the death of one in another vehicle. In the management of an automobile the operator is the one who preeminently must bear the responsibility for the consequences of its operation in the absence of proof of specific instructions by the master. To hold that the people must allege and prove intent, it seems to me, would make a dead letter of all this legislation and rob it of its vitality.

The authorities would seem to clearly uphold the proposition that an owner who may not personally participate in the violation of the law, or may be without knowledge of its violation by his or her agent, may be guilty of a misdemeanor in failing to affirmatively see that the provisions of the Labor Law are complied with in respect to his or her property. That very contention has been upheld in the Second Department in the case of *People* v. *J. Albert & Son,* 165 App. Div. 928. In that case the defendant, as owner and occupant of one of the floors of a factory building, was charged with having bolted and fastened, during work-

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ing hours, a door leading from the factory where a certain number of people were employed. An appeal to the Appellate Division was taken from a judgment of conviction. A reargument was ordered by the court upon the sole question whether the master is liable criminally for the acts of the servant in locking the door in the master's absence without general or specific instructions upon his part that it should be done. The judgment of conviction was affirmed after the reargument.

Nor do I see that under the law of this state the point that this was a fault of omission rather than of commission can prevail. In some states such a distinction would be possible. It seems to me that under our statute there are no exceptions, but that any one would be guilty of manslaughter who, while engaged in the commission of a misdemeanor, brings about the death of another irrespective of the fact that it was *malum prohibitum* or *malum in se*.

As to whether the pleader has shown any connection between any causal acts of omission of these defendants, as set forth, and the death alleged to have been caused by such omissions, I feel that the allegations are sufficient from the point of view of the indictment. The test here is rather upon the proof. And, likewise, as to whether the Diamonds can be held to have committed homicide by reason of the death of any persons occurring while in the commission of a misdemeanor which death they did not cause; and that facts must be shown that the Diamonds did cause death; this again, is a question of proof rather than of pleading, and the allegations as to this I hold to be sufficient.

The obvious intent of the legislature, under the Labor Law, was to fix and determine the obligations of a property owner, and the power of the legislature was never more strongly shown than when it holds an

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owner of a building, although absent, and, indeed, without knowledge of the acts of omission or commission, responsible for that situation. Grievous and onerous as is the burden upon owners and agents of owners of property under this law, especially relating to acts of omission, as in this case, followed by the serious situation of a charge of manslaughter, still it is only by the enforcement of such laws that careless landlords and lessees would be stimulated to take such measures in following the law as to relieve them of such a liability. It intended to, and did, prescribe in this law punishment for violations thereof, so as to hold an owner to the keen care of his property where human life is in danger. "Responsibility prevents crime" was said by Burke, and while, perhaps, the phrase is general, still it contains the spirit of laws which seek to spur owners and those in charge of property to greater care and to discourage them from dereliction of duty.

As to any arguments upon the degree of culpability between the owner's or agent's guilt and that of one actually in charge of the premises in occupation and management thereof, those arguments are rather to be addressed to a petit jury who would, after hearing all the evidence, be in a position to decide as to such degrees of guilt.

A reading of the various sections of the Labor Law which have been discussed in this case would indicate the evident intent of the legislature, in this very elaborately constructed law, to definitely and explicitly fix and determine the parties who should be held responsible for any infraction of the law. Parties are defined and penalties are provided for omissions of these parties to follow the law as laid down. It is a serious obligation that devolves upon the owner of property under this law, but it seems to me that the legislature

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intended to fix beyond all argument where the burden should be placed. The responsibility for jeopardizing human life should be fixed and that without vagueness or uncertainty. To hold that an owner of premises, because he was not at the same time an occupant thereof, is therefore free from responsibility for consequences where he had omitted a clearly prescribed condition, would be placing a premium upon careless landlords and rendering immune those who fail to adopt and provide those things required under the law.

I have considered the other points raised, but for the reasons stated above, I overrule the demurrers, interposed by the defendants Celia Diamond and Edward L. Diamond to this indictment, and this to apply to the other indictments.

Demurrers overruled.

DANIEL GREENWALD, Respondent, *v.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Carriers — of goods — action for damages — trial — interstate commerce commission — verdict.

Certain goods were packed by plaintiff in a car upon the tracks of, and delivered at Detroit for shipment to, a connecting carrier of defendant. The car upon its arrival in New York city, the place of delivery specified in the bill of lading upon which there was a notation "Car to be opened by consignee," was opened by defendant's employees, who, according to custom, proceeded to store the goods or otherwise handle them for delivery to the representatives of plaintiff. In an action for damage to the goods witnesses for plaintiff testified that in unloading the car some of the goods were thrown about and trampled on and the evidence on behalf of defendant was to the

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effect that the car had been improperly and carelessly loaded. Upon reversing a judgment entered upon a verdict in favor of plaintiff, held:

That a request to charge that defendant having filed with the interstate commerce commission rules and regulations which provided that defendant should unload all cars consigned to the place mentioned in the bill of lading its connecting carrier had no authority to vary such regulation, correctly stated the rule as to the binding character of the tariffs and regulations filed with the interstate commerce commission and that the refusal to so charge was error.

That as it appeared that the damage to the goods, if any, resulted not from the opening of the car but from the subsequent handling of the goods, it was also error to refuse to charge that "if the jury find that the damage was due to the improper packing by the shipper, the defendant is not liable," and "that unless the jury find that the damage occurred while the property was being unloaded by the defendant, the verdict should be for defendant," particularly as the only issues to be submitted to the jury had not been clearly laid down in the main charge.

APPEAL by defendant from a judgment of the City Court of the city of New York, in favor of plaintiff, entered upon the verdict of a jury.

Alex. S. Lyman (William Mann, and Jacob Aronson, of counsel), for appellant.

Franklin Bien, for respondent.

BIJUR, J. This action was brought by plaintiff for damages to a shipment of goods from Detroit to New York. The goods were packed by plaintiff in a car at Detroit upon the tracks of and delivered for shipment to a connecting carrier of the defendant, the Michigan Central Railroad Company. The bill of lading, which is otherwise in the ordinary form, has a notation "Car to be opened by consignee." When the car reached the place of delivery specified, namely, the Franklin Street pier of the defendant, in this city, it

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was opened by defendant's employees, who, in accordance with their usual custom, proceeded to store the goods or otherwise handle them for delivery to the plaintiff's representatives.

Plaintiff's witnesses testified that in the course of this unloading of the car some of the goods were thrown about, trampled on and presumably damaged. Defendant gave evidence to the effect that the car was improperly and carelessly loaded by plaintiff's representatives at Detroit.

In order to make clear the issue to be determined by the jury, defendant presented three requests to charge, each one of which was correct, but all of which were declined by the learned trial court. The third request was that because defendant had filed with the interstate commerce commission rules and regulations which provided that defendant should unload all cars consigned to the Franklin Street station, the Michigan Central Railroad Company had no authority to vary such regulation. This request stated the correct rule as to the binding character of the tariffs and regulations filed with the interstate commerce commission. See *Pennsylvania Railroad Company* v. *Puritan Coal Co.*, 237 U. S. 121; *Boston & Maine R. R. Co.* v. *Hooker*, 233 id. 97.

However, the entire subject of the opening of the car by the plaintiff is entirely immaterial because the damage, if any, caused by the defendant resulted not from opening the car, but from the subsequent handling of the goods. As to this defendant's first request was that " if the jury find that the damage was due to the improper packing by the shipper, the defendant is not liable," and the second request (being the corollary of the first) " that unless the jury find that the damage occurred while the property was being unloaded by the defendant, the verdict should be for defendant."

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These requests stated correctly the only issues to be submitted to the jury, and particularly as they had not been clearly laid down in the main charge they should have been charged as requested.

As there must be a new trial, it may not be inept to call attention to the fact that a totally incorrect rule of damages was apparently permitted to be allowed in the proof. If plaintiff has been damaged by the negligence of the defendant, the correct measure of damage is the difference between the market value here of the goods in the condition in which they were when shipped and their market value in the condition in which they were delivered by defendant to plaintiff.

Guy and Cohalan, J.J., concur.

Judgment reversed and new trial granted, with costs to appellant to abide event.

THOMAS ADELSTEIN, Respondent, *v.* ROEBLING CONSTRUCTION COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Labor Law, § 18 — meaning of word "scaffold" — action for personal injuries by employee.

The principal function of a "scaffold" within the meaning of section 18 of the Labor Law and used in construction with the erection or alteration of a building or "structure" is to support in a convenient position the workmen engaged in the construction either while they are working in a fixed position or possibly even while they are passing to and fro while at work.

A wooden form used and intended to be used exclusively as the frame work to contain and hold, while hardening, a section of concrete, but not for the purpose of supporting a workman, is not a "scaffold" within the meaning of said section 18 of the Labor Law.

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In an action by an employee who was injured by stepping on the wooden form used for laying concrete, an instruction which permitted the jury to consider the case as though a "scaffold" were involved and, as such, within said section 18 of the Labor Law, constitutes reversible error.

Cohalan, J., dissents.

APPEAL by defendant from a judgment of the City Court of the city of New York, in favor of plaintiff, entered upon the verdict of a jury.

William F. McCombs (Alexander Gordon, of counsel), for appellant.

Aaron A. Feinberg (L. F. Fish, of counsel), for respondent.

BIJUR, J. Plaintiff has recovered damages for personal injuries. At the time of the accident plaintiff was an iron worker employed by the Prince Iron Works engaged in some construction work on a building in East Seventy-fifth street. Defendant was engaged in the installation of concrete floors in the same building. Its men were installing such floors on the seventh floor. The method of construction is approximately as follows:

Iron girders bearing the floor were placed some six and a half feet apart. They were about fourteen feet long. They thus formed the side of an open panel fourteen feet by six and a half feet. The flanges of these beams are about ten inches wide; the beam itself about a foot in depth. The concrete floor to fill this panel is laid or poured upon a "form." In order to construct this "form" a board is hung by wires running around the beam and brought flat to the lower flange of the beam. A small upright is then nailed on the inner (namely, the panel) side of this board. Another board is then nailed to the top of this small up-

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right standing one. Then cross joists, two by four, are nailed by a single heavy nail to the bottom of the last-named board. The joists extend across the panel. This construction is merely temporary to hold the joists in place. An iron strap is then passed under either end of these joists and clamped over the top flange of the iron beams. By this means the joists are held firmly in place. Planks are then laid on top of the joists and nailed into place forming a sort of flooring at a point where in the completed building the ceiling would be. The concrete is then laid upon this plank flooring and made level with the upper flange and allowed to dry.

Plaintiff, who had worked on this building for some time, was familiar with this mode of construction; and had been warned by his foreman not to step upon these "forms." He was bringing a plank up from a lower floor to pass to his foreman on the eighth floor. He left the stairway on the seventh floor and walked to the second panel on the flange of the iron beams, and, when he had reached a point several feet along the flange of the beam that formed the side of this panel, he found the flange to be obstructed by a pile of boards laid on it. He told apparently contradictory stories as to the condition of the "form" on this panel, *i. e.*, that it consisted of only the two by four joists standing up on edge; and that these joists had already been covered by the planks. He testified that at this point he called to some one in charge of defendant's workmen to take away the planks, but that this foreman or superintendent then told him to move along or something to that effect, and added, that he should or might step upon the "form." He started to pass the plank up to his foreman on the next floor (the eighth floor being at that time entirely open in that vicinity), and to do so stepped upon the "form" which thereupon

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gave way in whole or in part precipitating him to the floor of the completed sixth floor. There is no contradiction of the fact that the two by four joists of this "form" were at that time not held by the iron straps around the girders, but were merely nailed to the planks which I have described; and it is also conceded that in that condition the joists will bear no serious or substantial weight.

The learned judge below, over the exception and objection of the defendant, charged the jury that there was a statute, namely, section 18 of the Labor Law, which forbade the defendant to erect a scaffold or other mechanical contrivance which was unsafe, unsuitable or improper, and added that that was the standard set by the legislature altering the old common law standard, which he explained. He then said: "The first question is was section 18 which I have just read to you performed or violated by the Roebling Construction Company? Did the Roebling Construction Company furnish in this building a scaffold or mechanical contrivance which was unsafe or improper? * * * In the second place did the Roebling Construction Company owe a duty to plaintiff respecting this scaffold, panel or arch? * * * And in the third place was the plaintiff guilty of contributory negligence." It may be said incidentally that defendant apparently concedes that if this was a scaffolding the mere fact that it was used by one not an employee of the defendant would not discharge the latter from liability. *Huston* v. *Dobson,* 138 App. Div. 810; *Quigley* v. *Thatcher,* 207 N. Y. 66.

The first point, therefore, to be determined on this appeal is whether the construction and circumstances revealed by this record warrant the application of section 18 of the Labor Law. I have no doubt that they do not. The Court of Appeals has pointed out in *Caddy*

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v. *Interborough R. T. Co.*, 195 N. Y. 415 (at pp. 421–424), the great difficulty of attempting to define a scaffold, but however great may be the difficulty of formulating an adequate definition, it will, I think, be universally conceded that the principal, if not the exclusive, function of a scaffold used in construction with the erection or alteration of a building or "structure" is to support in a convenient position the workmen engaged in the construction either while they are working in a fixed position or possibly even while they are passing to and fro in the course of the work. The "form" which gave way below the plaintiff's weight in the case at bar was not intended, designed or constructed for the purpose of supporting a workman in any event or on any occasion. It was used and intended to be used exclusively as the framework to contain and hold while hardening a section of concrete which when "set" became part of a floor. Even if the defendant or one of its representatives having adequate authority either permitted or authorized persons occasionally to step upon or pass over this "form," while it might under appropriate circumstances be held for negligence in that regard, that would not change the character of the construction into a scaffold. This analysis of its function and its utter lack of likeness to what we commonly understand to be a scaffold is emphasized by the fact that, as testified to by the plaintiff, the top of the joists, even if covered with planks upon which the plaintiff stepped, was some ten to twelve inches below the level of the flange on which he was walking and which would form the final level of the completed floor. In other words, if the floor of a building constructed as the one in the case at bar were completely equipped with these forms it would consist of a series of rectangular depressions fourteen by six and a half feet in

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length and width, respectively, and ten inches to a foot in depth. These depressed spaces, it seems to me, may far more accurately be denominated "pits" than scaffolds.

Plaintiff's counsel appreciates the great discrepancy between the scaffold designated by the law and the construction involved in the case at bar, and realizes the significance of *Haughey* v. *Thatcher,* 89 App. Div. 375, in which a somewhat similar erection, spoken of as a "temporary or false arch," was held by a unanimous court not to be a scaffold. He concedes that this case has never been overruled or adversely criticised; but endeavors to avoid its effect by claiming that it must "yield to later authority," whereby he means, for example, as was said by the Court of Appeals in *Bohnhoff* v. *Fischer,* 210 N. Y. 172, that "the said statute is to be liberally construed to accomplish its beneficent purpose." But, however great our sympathy with an injured workman and however great our desire to construe a statute "liberally," the law cannot by any device be made to cover an occurrence and set of circumstances or a structure which by its terms is manifestly excluded from its operation.

He cites also *Nixon* v. *Thompson-Starrett Co.,* 131 App. Div. 152, in which planks laid over iron floor beams to enable men to carry material over them were held to constitute a scaffold, but the very statement of the case indicates strikingly the difference between it and the one at bar. Of another case (*Brady* v. *Pennsylvania Steel Co.,* 134 App. Div. 372) in which certain ties used in the construction of the deck of a bridge were held not to constitute a scaffold, he says that the decision was reversed by the Court of Appeals in 215 N. Y. 456. A reference to the latter case, however, shows that the decision of the Appellate Division which was reversed is an affirmance without an opinion,

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reported in 155 App. Div. 933, on the authority of a previous opinion in the same action upon an appeal from a second trial which also resulted in reversal, reported in 138 App. Div. 233. The opinion on the final reversal in the Court of Appeals shows that the question of scaffolding was not involved at all, both sides having apparently acquiesced, after the first decision in the Appellate Division, in its interpretation that the ties did not constitute a scaffold.

The error in permitting the jury to consider the case as though a scaffold were involved is, of course, serious, for as the learned judge below correctly remarked, the statute has changed the old common-law rule by imposing upon the master the absolute duty of actual safety. See *Holloway* v. *McWilliams*, 97 App. Div. 360, citing *Stewart* v. *Ferguson*, 164 N. Y. 553, and referring to the former rule as enunciated in *Butler* v. *Townsend*, 126 id. 105. It is quite evident that if the element of scaffolding is removed from the case the questions to be considered by the jury will be altogether different and must be regarded from an altogether different standpoint. If this was a scaffold the safety whereof was substantially insured by the master by its very construction, there was little left for the jury to determine. For, unless it was manifestly incomplete to the point of apparent danger, there would be difficulty in predicating contributory negligence on the part of the plaintiff upon such a state of facts, even without the assurance which he claims to have received of its safety. On the other hand, if it was not a scaffold, although the defendant might be held liable for some forms of negligence in relation thereto, it is at least a grave question whether any foreman or superintendent had authority to bind the defendant to an express or implied assurance of its safety when used

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for a purpose altogether foreign to that for which it had been designed and installed.

Upon these subjects we neither express nor intend to indicate any opinion, but refer to them only for the purpose of emphasizing the importance of the theory upon which the case was tried and the different emphasis to be laid upon the facts according to the one or the other theory adopted.

There were also many other issues of fact litigated, to which we have not thought it necessary to advert.

GUY, J., concurs; COHALAN, J., dissents.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

J. MAXWELL GORDON, Appellant *v.* MORDECAI BENGUIAT and EPHRAIM BENGUIAT, copartners doing business as H. E. BENGUIAT & SON, Respondents, and SABBATIA CHAIT and PAUL BECK, Defendants.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Negotiable instruments — pleading — proof of tender of collateral — designation of place of payment — trial.

Where on the trial of an action on a promissory note secured by collateral and payable two months after date at a fixed place, the court being of opinion that a separate defense that plaintiff never tendered the collateral security upon demand for payment was good, plaintiff's counsel asked questions designed either to prove tender of the collateral at the time of the demand for payment or a waiver of or excuse for such tender, an objection to the questions as immaterial, irrelevant and incompetent is not good, and, if sustained, a judgment for the dismissal of the complaint on the merits must be reversed for such error alone.

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The designation of a place for payment of a note does not make it incumbent as a preceding condition to create a liability against the maker of the note or give a recovery thereon that it should be presented at that particular place, but the omission or failure to make such presentment will relieve him from damages in case he was ready at the time and place to pay the note and there was no one there to receive the money.

Defendant not having pleaded that he was ready at the time and place appointed to pay the note and that there was no one there to receive the money, the so-called separate defense did not constitute even a partial defense as against costs and interest.

APPEAL by plaintiff from a judgment of the City Court of the city of New York, dismissing the complaint upon the merits.

Berger, Diamond & Abrahams (Milton Diamond, of counsel), for appellant.

Louis Ogust, for respondents Benguiat.

BIJUR, J. It is evident at the outset that on the record the dismissal should have been merely for failure of proof and not upon the merits, and that the judgment would have to be modified accordingly; but that is of no importance, because, in my opinion, the judgment should be reversed for error of law.

Plaintiff sued as the holder of a promissory note payable two months after date at a fixed place. The only defendants served with process were the makers. The answer in its denials raises no issue material to the question raised on this appeal except an implied denial that the note was *duly* presented for payment and payment refused, it being admitted, however, that it was presented and payment refused. As a "separate defense" defendants allege that "the note in suit is a collateral note secured by collateral security

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* * * and that the plaintiff herein never has tendered the said collateral security to defendants herein upon the demand for payment of said note." Apparently the learned court below was of opinion that this allegation stated a good defense. Plaintiff's counsel thereupon, for the purposes of the trial, acquiesced in the court's view and asked a series of questions designed either to prove tender of the collateral at the time of the demand for payment or a waiver of or excuse for such tender. The only objection taken to the questions was that they were immaterial, irrelevant and incompetent. As this objection was manifestly not good, I am at a loss to understand why the objection was sustained, and for this reason alone the judgment would have to be reversed.

But I place the reversal upon a more important ground going to the merit of the controversy. At the trial plaintiff produced the note and his counsel tendered the collateral. Defendants' counsel insists, and in this view the learned court below appeared to have agreed with him, that such tender is insufficient; but that the tender of the collateral should have been made at the time and place when the demand for payment was made, namely, the time of the maturity of the note. To support this contention, defendant-respondent cites a number of cases which, to my mind, fail to sustain his view. His error consists in overlooking the fundamental principle laid down in *Hills* v. *Place,* 48 N. Y. 520, 522, 523, now embodied substantially in the Negotiable Instruments Law as section 130. In the case named the court said: "Such designation (namely, of a place for payment) did not make it incumbent, as a precedent condition, to create a liability or obligation by the maker of the note to pay it, or to give a right of a recovery thereon, that it should be presented at that particular place for payment. The effect or con-

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sequence of an omission or failure to make such presentment was not to exonerate the maker from his promise to pay what he had agreed, but only to relieve him from damages in case he was ready at the time and place appointed to pay it, and there was no one there to receive the money. Such readiness is considered equivalent to a tender of the sum payable, and an answer pleading that fact, and a payment of the money due into court, would be a bar to a recovery of interest and costs, but not to the cause of action." See also *Baldwin's Bank* v. *Smith,* 215 N. Y. 76.

Since, therefore, plaintiff was not bound to present the note in suit for payment at maturity, it follows inevitably that he was not bound to tender the collateral at that time. In *Field* v. *Sibley,* 74 App. Div. 81, it is pointed out that a demand note may be sued upon without preliminary demand, and that there is no reason why the rule should not be followed if the note is accompanied by collateral, it being sufficient to produce the collateral and tender it at the trial. The respondent quotes from the opinion the following sentence: "I have no quarrel with the doctrine that, where a demand was necessary, the collateral as well as the note must be present to constitute a valid demand." But respondent fails to note the emphasis on the phrase "*where a demand was necessary.*" A consideration of that exception is sufficient to distinguish another case cited by respondent, namely, *Ocean Nat. Bank* v. *Fant,* 50 N. Y. 474, where *an indorser was sued.* It was held that a demand without tender of collateral was insufficient to charge the indorser with liability. That, of course, was a case where "a demand was necessary" as a prerequisite to defendant's liability. In the case at bar, as I have shown, no such demand was necessary. See also cases cited in *Wagner* v. *Kohn,* 225 Fed. Rep. 718, 721.

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Among other authorities there mentioned there is an extract from Colebrook on Collateral Securities, section 106: "The pledgee of negotiable collateral paper, although entitled upon default to enforce payment of the principal obligations and to retain such collateral securities on payment, should be ready *in such action* * * * to produce the collateral securities, etc."

There being no pleading by the defendant to the effect that "He was ready at the time and place appointed to pay it and there was no one there to receive the money" (from *Hills* v. *Place*, *supra*), the matter alleged in the so-called separate defense does not even constitute a partial defense against the costs and interests.

GUY and COHALAN, JJ., concur.

Judgment reversed and new trial granted, with costs to appellant to abide event.

BERNHARD BLUMENTHAL, Appellant, *v.* CLARENCE H. KELSEY, as Administrator, etc., Respondent.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Evidence — in action against administrator — Code Civ. Pro. § 829.

In an action against an administrator, appointed as the successor of a deceased administrator, the testimony of plaintiff as to conversations with the deceased administrator is incompetent under section 829 of the Code of Civil Procedure.

APPEAL by plaintiff from a judgment of the City Court of the city of New York dismissing the complaint at the close of plaintiff's case.

Rounds, Hatch, Dillingham and Debevoise (George S. Brengle, of counsel), for appellant.

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Elkus, Gleason & Proskauer (Abram I. Elkus, and William E. Collins, of counsel), for respondent.

BIJUR, J. Plaintiff sues for certain sums collected by defendant as rentals for bill-board privileges on fences erected upon property in the northern part of this city.

It appears from the pleadings and proofs that plaintiff had been a tenant of these premises for a long time prior to April 28, 1911; that on that date a paper was executed by plaintiff and defendant's predecessor in administration which provided (so far as material to this appeal): "I, Bernhard Blumenthal, do hereby certify * * * that I * * * have surrendered and do hereby surrender any lease or tenancy that I have in the premises (described) as the same are now occupied by me, and that I have hired and taken the said premises * * * for the term of one month as a monthly tenant only at the monthly rental of $2.50."

Plaintiff claimed and claims that defendant collected the rent for the bill-board privileges on the fences situated on this property during the term of plaintiff's occupancy beginning May 1, 1911, and the collection of such rents is admitted by the defendant.

This appeal is taken from the judgment on the second trial of the case. On the first trial the court below was of opinion that the words "as the same are now occupied by me" qualified only the premises as surrendered and did not limit the premises as newly rented, and thereupon directed a verdict for plaintiff. Upon appeal to this court it was held that the qualifying words limited the estate of the tenant under the instrument of April twenty-eighth itself, and that, therefore, no recovery could be had by him until he showed the character or extent of his occupation under

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the previous arrangements. Our opinion on the previous appeal is repeatedly referred to in the briefs on this appeal, apparently on the theory that we had determined all the questions of law in this case for the purposes of a second trial regardless of whether they had been raised or even suggested on the first trial or on the appeal from the judgment therein. It should be superfluous to state that such is not and cannot be the case.

On the second trial plaintiff apparently undertook to prove that the instrument of April 28, 1911, was not the complete agreement between the parties, but that there were other terms of that agreement made orally (presumably referring to the extent of the premises leased), and sought to prove these terms by offering evidence of a conversation between plaintiff and defendant's alleged agent at the time. When objection was made to such evidence on the ground that there was no proof of agency, plaintiff undertook to testify as to his conversation subsequent to the execution of the instrument with a then living but now deceased administrator of decedent's estate, but such testimony was excluded upon the objection that it was obnoxious to the provisions of section 829 of the Code of Civil Procedure. While it is true that this court suggested on the previous appeal that plaintiff's manifestly simplest course would be to prove the extent of his prior occupation, it does not follow by any means that that was the only mode of proof possible to sustain the complaint.

It now appears that the defendant in his own answer alleges that the instrument of April 28, 1911, was not the complete agreement between the parties, but that some of the terms of that agreement were real. Plaintiff, thus accepting defendant's own version of the

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transaction, has sought to show what these oral terms were.

The first objection taken to the evidence was that it was incompetent, immaterial and irrelevant. Subsequently, and on a recasting of the form of the question, a bare objection was taken without explanation and was sustained. Finally, it was objected to on the ground that the authority of the agent had not been shown. When plaintiff undertook then to prove a conversation with defendant's deceased predecessor as administrator, the objection that it was incompetent under section 829 was sustained. The section forbids the examination of a party in his own interest as to personal transactions between the witness and the deceased person against the executor, administrator and survivor of that person " or (against) a person deriving his title or interest from, through or under a deceased person by assignment or otherwise." It is to this last clause of the provision that respondent appeals for his support.

However cogent may be the argument to the effect that an administrator, appointed as the successor of a deceased administrator, would not seem to be a person who has derived his title or interest from, through or under his deceased predecessor by assignment or otherwise, the latest decision is directly to the contrary (*Carpenter* v. *Romer & Tremper S. Co.*, 48 App. Div. 363, 370), overruling, though not in terms, *Bump* v. *Pratt*, 84 Hun, 201–202.

In the absence of any controlling decision to the contrary, therefore, we are constrained to hold that the testimony offered was incompetent, and as the plaintiff's whole case as made depended practically on proving the agency of Hecht, and this proof is thus shown to have been incompetent, the complaint was properly dismissed.

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Plaintiff also offered in evidence certain "papers" which were excluded. These "papers" seem to be a notice and petition in dispossess proceedings brought in December, 1913, by the defendant's predecessor against the plaintiff. If they are a part of the judgment-roll in such a proceeding, they were, of course, competent and might have been material so far as they contain admissions or recitals bearing upon the extent of the premises leased by the plaintiff; for apparently they undertake to describe his tenancy under the agreement of April 28, 1911. The offer in evidence, however, was so informal and incomplete that no substantial question is presented by their exclusion.

GUY, J., concurs. COHALAN, J., concurs in result.

Judgment affirmed, with costs.

MAURICE BLUM, Respondent, *v.* WILLIAM C. DAVIS, Defendant.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Evidence — in action to recover value of goods delivered and alleged to be lost.

Where, on the trial of an action to recover the value of a case of goods delivered to defendant and alleged to have been lost through the criminal complicity of defendant's driver with other persons, plaintiff's shipping clerk as a witness was unable to state the amount or character of the goods included in the shipment, the introduction in evidence, over objection, of a paper alleged to be a copy made by the bookkeeper of an entry in the books, which was alleged to have been made in turn from a shipping slip made out by the shipping clerk, is error, no proper foundation having been laid.

A contention that the error was not material, or at all events that no stress was laid thereon by the opposing counsel, considered, and held untenable.

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APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, in favor of plaintiff, entered upon the verdict of a jury.

Frederick W. Sperling, for appellant.

Joseph Levy, for respondent.

BIJUR, J. Plaintiff sued for the value of a case of coats delivered to defendant and alleged to have been lost through the criminal complicity of defendant's driver with certain other persons. Plaintiff has recovered the full amount of his claim, namely, the value of the shipment, $726.50, together with interest and costs.

It is unfortunate that after a prolonged trial this judgment must be reversed for material error in respect of proof of the value of the goods. When plaintiff's shipping clerk showed his inability to state the amount or character of the goods included in the shipment, there was introduced in evidence a paper alleged to be a copy made by the bookkeeper of an entry in the books which was alleged to have been made in turn from a shipping slip made out by the witness. It needs no citation of authority to demonstrate that no proper foundation, even under the most liberal construction, was laid for the introduction into evidence of this paper. See *City of New York* v. *Second Ave. Co*, 102 N. Y. 572.

Respondent claims that the error was not material, or at all events that appellant's counsel laid no stress on it, citing a remark made by appellant's counsel within a minute or so after the examination brought out this paper. Appellant's counsel said: "Well, I don't want to take up a lot of time over an immaterial issue." It is not clear to what counsel referred, but

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it is perfectly clear that he did not refer to adequate proof of this paper, for the next twelve pages of the record are replete with appellant's counsel's objections both to the introduction of the paper in evidence and to the use thereof by the witnesses for the alleged purpose of refreshing his recollection when the witness frankly conceded that his recollection was not refreshed, but that he would actually have to read the items from the paper. Moreover, to make appellant's counsel's position still clearer, at the close of the case his motion to dismiss was based " also upon the ground that the plaintiff has not properly established the items of damage; that the testimony introduced does not show the value of the merchandise that was lost.

It follows, therefore, that the judgment must be reversed and a new trial granted, with thirty dollars costs to appellant to abide the event.

GUY and COHALAN, JJ., concur.

Judgment reversed and new trial granted, with thirty dollars costs to appellant to abide event.

EMIL JANZ, Respondent, *v.* BERTHA SCHWENDER, also known as BERTHA SCHEWANDI, as Executrix of the Last Will and Testament of ALWINE KOLB, also known as ALLVINA KOLB, deceased, Appellant.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Services — rendition of personal — evidence when inadmissible — husband and wife — Code Civ. Pro. § 829.

Under section 60 of the Domestic Relations Law a wife has the exclusive cause of action for the rendition of personal services and, in an action by her husband for services rendered

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by her on her own account as a nurse to one since deceased, her testimony as to transactions with the decedent is inadmissible under section 829 of the Code of Civil Procedure as that of a person "interested in the event."

Where, in an action by the husband against the executrix of decedent for board furnished by plaintiff's wife to decedent, it does not appear who paid for and provided the food, or that it was served in plaintiff's house, a judgment in his favor cannot be sustained.

APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, in favor of plaintiff, after a trial by a judge without a jury.

Robson & Simpson (Ely Simpson, of counsel), for appellant.

Alfred K. Schwabach (Morris Cukor, of counsel), for respondent.

BIJUR, J. Plaintiff sued on four causes of action. The first is for board supplied by his wife to the deceased for two periods of nine and two weeks, respectively, of the reasonable value of twelve dollars a week. The second is for services of his wife rendered to the deceased as nurse for a brief period. The third is for a loan of twenty dollars to the deceased. The fourth is for services rendered by one Louisa Webber as nurse and laundress for approximately two weeks. Plaintiff recovered in full. He attempts to sustain his recovery on the first three causes of action by virtue of his marital right thus at the same time justifying the admission of testimony of his wife as to transactions by her with the deceased. He attempts to support his recovery in the fourth cause of action by a written assignment from the husband of Louisa Webber, thus

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also justifying her testimony as to transactions with the deceased.

Appellant contends that section 60 of the Domestic Relations Law gives the respective wives the exclusive cause of action for the services rendered, and that plaintiff derived no cause of action from the marital right; it would then follow that the evidence given by the wives was of persons interested in the event and thereby inadmissible under section 829 of the Code of Civil Procedure. This contention is plainly good as to the services of the plaintiff's wife as nurse, set forth in the second cause of action, services unquestionably rendered upon her own account and by no means to be considered to have been rendered in the course of her marital duty to her husband. The same reasoning, of course, applies to the services rendered by Louisa Webber, constituting the fourth cause of action.

So far as the third cause of action is concerned, being a loan of twenty dollars, the evidence is that plaintiff's wife loaned the money, and there is nothing to show that the money was not her sole property, and, therefore, no question of marital right is involved.

As far as the first cause of action is concerned, involving board for a period amounting in all to some eleven weeks, on the state of the record judgment for the plaintiff cannot be sustained. It does not appear who paid for and provided the food which was served to defendant. Nor does it clearly appear that the food was served in plaintiff's home, though such was probably the case. Should testimony be given on a new trial to that effect, plaintiff could probably recover on his first cause of action in accordance with the principle of *Stamp* v. *Franklin,* 144 N. Y. 607, since such services would not have been rendered by the wife in her separate capacity, but rather in the course of her marital relationship; that is to say, serving food purchased by

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her husband in his home to his boarders. See also *Stevens* v. *Cunningham,* 181 N. Y. 454.

For these reasons the judgment must be reversed and a new trial ordered, with thirty dollars costs to appellant to abide the event.

GUY and COHALAN, JJ., concur.

Judgment reversed and new trial ordered, with thirty dollars costs to appellant to abide event.

HAROLD WEISS and DAVID RITTER, copartners, trading as the IDEAL BUTTON CO., Respondents, *v.* ISAAC L. MEYER, Appellant.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Goods sold and delivered — action for — evidence insufficient to establish delivery — Code Civ. Pro. § 829.

In an action for goods sold and delivered, proof that they were packed in boxes by plaintiff who rendered a correct bill therefor and, upon sending the boxes back by the delivery boy to defendant with the original bills and the order slip, received receipts initialed by defendant's clerk and checked by her but only as to prices, is insufficient to establish delivery of the goods.

In such action testimony of plaintiff as to conversations with defendant's deceased partner bearing on the question of the value of the goods is inadmissible under section 829 of the Code of Civil Procedure.

APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, after a trial by a judge without a jury.

Sam L. Cohen, for appellant.

Alexander Wolf (Maxwell M. Schenkel, of counsel), for respondents.

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BIJUR, J. Plaintiffs sued for goods sold and delivered. The answer, in addition to denials, sets up a fraudulent scheme to deceive defendant as to the amount of the deliveries. Plaintiffs were button makers and defendant a manufacturer of ladies' coats.

Appellant contends that plaintiffs failed to prove delivery; failed to prove the agreed purchase price; that there was error in the admission of evidence of one of the plaintiffs as to his conversations with defendant's deceased partner; that there was error in excluding defendant's "garment register" from evidence; and that error was committed in permitting one of the plaintiffs to read from their carbon copy bills under the guise of refreshing his recollection.

In order to prove delivery, one of the plaintiffs testified that he received order slips from defendant; that he made up corresponding boxes of buttons and sent these boxes back by a delivery boy to defendant with the original bills, the order slip and a receipt. Plaintiff then called one of defendant's employees. She testified that these receipts were initialed by her and the bills were "checked" by her. She testified later, however, that the "checking" on the bills was solely as to prices and not as to quantities, and she also testified that, although she received merchandise, she did not know whether it was the quantity covered by the bill, and that she never examined or counted the buttons. The receipts never specified the quantities of buttons, but read merely "one package." The delivery boy was not called to testify.

It is quite evident that all that plaintiffs established by this testimony was that they had received orders from the defendant; that these orders had been accurately filled, the goods packed to correspond; and a correct bill made out. But there is no proof of delivery or competent proof of the agreed price. Such infer-

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ence as might ordinarily be drawn from defendant's retention of the bills is destroyed by the absence of proof on the part of the plaintiffs of what defendant did with the bills and the positive evidence on defendant's part that before the last bills were received (none being payable until the end of the month) protest was made as to the quantities of the goods, and this suit resulted.

In order to further show an agreed value, one of the plaintiffs testified to a conversation with defendant's deceased partner. This is clearly inadmissible under section 829 of the Code of Civil Procedure, providing that a person interested in the event shall not be examined as a witness in his own behalf against the survivor of a deceased person — which has been held to refer to a surviving partner. *Manning* v. *Schmitt,* 4 App. Div. 431; *Green* v. *Edick,* 56 N. Y. 613. See *Comstock* v. *Hier,* 73 N. Y. 269; *Adams* v. *Morrison,* 113 id. 152.

GUY and COHALAN, JJ., concur.

Judgment reversed and new trial ordered, with thirty dollars costs to appellant to abide event.

LOUIS HURWITZ and SAMUEL GROSS, etc., Appellants, *v.* MORTIMER H. DRYFOOS, Respondent.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Pleading — allegations of complaint — fraudulent representations — appeal.

A complaint alleging that plaintiffs were copartners engaged as salesmen of silk factories; that defendant induced them to enter his employ upon the false representation that he was

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"the factor for various manufacturers of silk fabrics and that he was in a position at that time to become the factor of many others * * * that he was financially in a position to act as factor to silk manufacturers, being at that time financially able to execute any and all orders and to effectuate any and all sales that might or could be obtained or negotiated by the plaintiffs for him to the extent of $250,000 per year and over in the manner and custom of the said trade of selling silk merchandise by means of factors and commission agents" states a cause of action.

While the complaint in such an action should allege that defendant made the alleged fraudulent representations with the intention that they should be acted upon, the point that the complaint contained no such allegation cannot be raised for the first time on appeal.

APPEAL by plaintiffs from a judgment of the Municipal Court of the city of New York, borough of Manhattan, seventh district, dismissing the complaint upon the pleadings and the opening of counsel.

David Haar, for appellants.

Walter S. Dryfoos, for respondent.

BIJUR, J. Plaintiffs sued for damages resulting from the alleged false representations of defendant. The complaint alleges that plaintiffs were copartners engaged as salesmen of silk fabrics; that defendant induced them to enter his employ upon the false representation that he was "the factor for various manufacturers of silk fabrics and that he was in a position at that time to become the factor of many others * * * that he was financially in a position to act as factor to silk manufacturers, being at that time financially able to execute any and all orders and to effectuate any and all sales that might or could be obtained or negotiated by the plaintiffs for him to the

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extent of $250,000 per year and over in the manner and custom of the said trade of selling silk merchandise by means of factors and commission agents." There are further allegations explaining that to do a business of the extent named the factor must, according to the custom of the trade, have a "cash or credit account sufficient to obtain merchandise, etc."

The learned judge below evidently entertained the view that this was the statement of an opinion or hope rather than of a fact.

The respondent cites in support of the judgment, among other cases, *People* v. *Majorana,* 155 App. Div. 431; but a reading of that case demonstrates clearly that, as the court says: "The assurance that he *would* perform the service was a promise, and that he *could* do it was a matter of opinion." The alleged statement of the defendant in the case at bar was that he actually then had the financial ability to do a certain amount of business according to the custom of the trade, and that, according to that same action, said ability required his having a certain cash or credit account which he did not have. It may be difficult for the plaintiffs to prove, either at all or with sufficient certainty, the allegations of the complaint, but with that we are not concerned. The statements as pleaded were statements of a fact, namely, in substance, the extent of defendant's cash or credit.

On the present appeal, defendant's counsel also urges that there is no allegation in the complaint to the effect that defendant made the representation "with the intention that it should be acted upon by the plaintiffs." Such an allegation is no doubt necessary to sustain an action based on false representations, and if it is not to be found in the complaint the latter is defective; but an examination of the record shows that that point was not raised below, and it is

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not, therefore, available here. See particularly *McCarton* v. *City of New York*, 149 App. Div. 516. Moreover, as I understand respondent's position, no stress is laid upon this point, the real question in controversy being the one first above discussed.

GUY and COHALAN, JJ., concur.

Judgement reversed and new trial granted, with thirty dollars costs to appellant to abide event.

RUDOLPH WINTER, Appellant, *v.* PETER DOELGER BREWING COMPANY, Respondent.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Negligence — corporations — recovery in common law action — pleading — Workmen's Compensation Law — appeal.

It is a matter of common knowledge that individuals and corporations operate and own respectively enterprises and properties entirely unrelated to and independent of one another.

Defendant conducts a brewery and while one of its drivers was delivering beer to a saloon-keeper at premises disconnected from the brewery he was injured by reason of the collapse of an elevator on the premises which were owned by defendant. Held, that the driver could recover against defendant in a common law action, and a dismissal of the complaint at the trial on the ground that the remedy given by the Workmen's Compensation Law is exclusive was error for which the judgment in favor of defendant should be reversed.

Guy, J., dissents.

APPEAL by plaintiff from a judgment of the Municipal Court of the City of New York, borough of Manhattan, fourth district, dismissing his complaint after a trial by a judge without a jury.

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Walter A. Swett (John J. McBride, of counsel), for appellant.

Frank J. O'Neill (Barent L. Visscher, of counsel), for respondent.

BIJUR, J. Defendant conducts a brewery. Plaintiff was one of its drivers engaged in delivering beer. While making such a delivery to a saloon-keeper at premises disconnected with the brewery, he was injured through the collapse of an elevator on said premises. Defendant happened to be the owner of these premises, and has succeeded in the court below on the plea that the remedy given by the Workmen's Compensation Law is exclusive.

The case of *Lester* v. *Otis Elevator Co.*, 169 App. Div. 613, is determinative of the point that that law does not deprive the injured employee of his common law remedy against a third person by whose negligence he may be injured, although at the time he was pursuing his duties under the terms of his employment. It seems to me to follow as the inevitable corollary of that proposition that if he be injured while in the course of his master's employment through the negligence of that master when the latter is engaged in an enterprise altogether independent of and unrelated to the business in which the servant is employed (*i. e.*, in this case the ownership of separate real estate), the master as to that enterprise must be regarded as a third party. It is a matter of common knowledge that individuals and corporations operate and own respectively enterprises and properties entirely unrelated to and independent of one another. The Workmen's Compensation Law was surely not intended to prevent an employee from recovering under the common law for negligence of a person or corporation merely

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because in an entirely different capacity and interest he or it happened to be the owner of such an independent enterprise or property. This, for example, would, it seems to me, be apparent if the plaintiff while engaged in the business of the brewery conducted by the defendant happened to be injured through the negligence of officers of a steamboat plying on a route hundreds of miles from this city merely because the steamboat was owned by the brewery corporation.

Judgment reversed and new trial ordered with thirty dollars costs to appellant to abide the event.

COHALAN, J., concurs.

GUY, J. (dissenting). Plaintiff appeals from a judgment dismissing the complaint in an action brought to recover damages for personal injuries sustained by him while performing duties as an employee of the defendant in unloading certain barrels of beer placed in his custody as a truckman by defendant, with orders to deliver same at premises owned by the defendant where the accident occurred.

Plaintiff's injury was due to the alleged defective condition of a sidewalk elevator belonging to defendant, on which, at the time of the accident, plaintiff was engaged in loading the beer in question.

The learned trial court dismissed the complaint, holding that plaintiff's only remedy was under the Workmen's Compensation Law.

It was stipulated on the trial by both parties that "defendant was the owner of the premises where the accident occurred; that defendant maintained and controlled the sidewalk elevator; that the elevator was in a defective condition; that the plaintiff was in the employ of the defendant as a brewery truck driver, and, *at the time of the accident, was engaged in hand-*

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ling merchandise of the defendant, in the defendant's business; that the defendant had theretofore secured the payment of compensation for injured employees and their dependents pursuant to the provisions of section 50 of chapter 67 of the Consolidated Laws; and that such payment was secured for the benefit of the plaintiff, as well as for the benefit of other employees."

Plaintiff states in his brief (p. 3): "The plaintiff does not dispute the right to his remedy under the provisions of the Workmen's Compensation Law, nor is there any contention that the instant case militates against that law. The action was brought against the owner of the building at 100th street and Central Park West, in accordance with the provision of the statute, which provides that an injured employee may elect to take compensation from the employer, or resort to his remedy at common law, against a third party whose negligence brought about the injury."

The sole point at issue on this appeal is whether the defendant is to be regarded as a third party, within the meaning of the statute, merely because he was the owner of the building where the accident occurred and where the defect existed which caused plaintiff's injury. I am of the opinion that there is no ground whatever for the contention that defendant is a third party within the meaning of the statute. The law was enacted primarily for the purpose of definitely fixing and determining the respective rights and obligations of employers and employees as to injuries sustained by employees in the course of their employment and while engaged in the master's business for which they are employed. The statute does not contemplate that an employer shall have a dual legal personality — a sort of Doctor Jekyl and Mr. Hyde — so far as relations with his employees are concerned, in connection with matters growing out of and directly connected

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with such employment. Whether the employer might be held liable as a third party where he was the responsible cause of an employee's injury through agencies controlled by him, which were entirely separate, apart and distinct from the employment of the injured employee, may be an interesting academic question, but has nothing whatever to do with this case. The concession that plaintiff has a right of action against the defendant as his employer under the Workmen's Compensation Law carries with it the assumption that the injury occurred in the course of and connected with plaintiff's employment by the defendant. But were there any doubt on that point, it is entirely removed by the further stipulation entered upon the record, that "at the time of the accident plaintiff was engaged in handling merchandise of the defendant, in the defendant's business," and this is supplemented by further proof that the elevator was the appliance furnished by the employer for the use of his employee in the performance of his duty in delivering the barrels of beer at the place where he was instructed to deliver them by his employer. The judgment should be affirmed.

Judgment reversed and new trial ordered, with thirty dollars costs to appellant to abide event.

LOUIS W. NOEL, Appellant, *v.* WESTCOTT EXPRESS COMPANY, Respondent.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Carriers—contracts—evidence—Public Service Commissions Law, § 38.

Where the holder of a ticket over a railroad from Tuxedo to New York city went to the baggage department of the station at Tuxedo and, upon asking the expressman to have his bag transferred to his house in New York city, was told that the transfer check would cost forty cents, which plaintiff paid and received a receipt therefor, the expressman taking possession

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of the bag which the railway company delivered to defendant, an express company, in New York city for delivery, the express company in handling the bag under the contract made at Tuxedo was engaged in intrastate commerce.

Where the special delivery check was designed, as stated by the railroad rules and regulations, "for the checking of baggage from any line station to the residence, hotels, steamboat piers or railroad stations" and does so by direction of a passenger that his bag be transported at the end of the journey to his home, the railroad company receiving four cents of the total charge of forty cents for the service, the railroad company acted as agent for defendant, the express company.

While a common carrier in the absence of special contract for a through shipment is not liable beyond the terminus of its own route, the railroad company was not liable to the passenger as upon a through shipment for loss of his bag while in the hands of the express company, as the special delivery check did not evidence a special contract.

A local baggage carrier by rendering services connected with interstate passenger traffic in the transportation of baggage from a railroad terminal to residences, etc., in a city is not a common carrier or express company subject to the provisions of the act to regulate commerce. Carmack Amendment, U. S. Stat. at Large, §§ 1905–1907, chap. 3591.

The limitation in section 38 of the Public Service Commissions Law that the value of baggage carried in excess of $150 shall be stated upon delivery to the carrier which may make a reasonable charge for the assumption of such liability is not available to an express company which as agent of a railroad company upon receiving a passenger's bag fails to ask him to state its value.

APPEAL by plaintiff from so much of a judgment of the Municipal Court of the city of New York, borough of Manhattan, fourth district, as limits his recovery to the sum of $100 with interest and costs, and grants him judgment for said sum only.

Augustin Derby, and Lyle E. Mahan, for appellant.

Carter, Ledyard & Milburn (Milton C. Lightner, of counsel), for respondent.

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GUY, J. On the morning of November 16, 1914, the plaintiff, having in his possession a railroad ticket over the Erie railroad from Tuxedo to New York, went to the baggage department of the station at Tuxedo and asked the expressman to have his bag transferred to his house in New York city. The expressman told plaintiff that the transfer check would cost forty cents, and plaintiff paid that amount and got a receipt for it, the expressman taking possession of the bag. Plaintiff was not asked the value of the property, and he did not state it. He went to New York that morning over the Erie, but never got his bag or its contents; and the action is brought to recover the value of the property, which was admittedly received by the defendant from the railroad company. A shipment from Tuxedo to New York over the Erie railroad passes through New Jersey.

The theory of the action is that the Erie Railroad Company, as the agent of defendant, arranged at Tuxedo for the transportation of plaintiff's bag to New York; that as such agent it collected on behalf of the defendant the transportation charges; and that defendant, a New York common carrier, by reason of its breach of contract and its failure to perform its duty as a common carrier, is liable for the value of the property.

Defendant, claiming the benefit of certain rules and regulations, or so-called tariff, of the railroad company filed, pursuant to act of congress, with the interstate commerce commission, made an offer of judgment for $100 and costs; the court, after a trial of the issues, gave judgment for plaintiff for $106 damages with costs in addition; and it is stipulated by the parties that the decision of the court limited plaintiff's damages to $100 under section 16b of the Erie Railroad tariff, providing that the value of property shipped be

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agreed to be not in excess of $100, unless greater value is declared and an extra charge paid; and that such decision included in the damages granted $6 for one year's interest.

As the holder of a ticket over the Erie railroad from Tuxedo to New York, the plaintiff was entitled to have his bag carried by the railroad company to its terminal in New York city free of charge. Performance of the contract made by the plaintiff with that company at Tuxedo for delivery of his bag at his house could not begin until the bag arrived at the New York terminal. It is evident, therefore, that in handling the bag under the contract made at Tuxedo the defendant was engaged in intrastate, not interstate, commerce. In this respect the case is similar to *State of New York ex rel. Pennsylvania R. R. Co.* v. *Knight,* 192 U. S. 21. There the railroad disputed the validity of a license tax imposed by the city of New York upon the cab service established by the railroad solely to transfer passengers who were coming from or going on interstate trips, from the railroad terminal to points in the city and *vice versa,* the railroad asserting that the cabs were engaged in interstate commerce and, therefore, not subject to domestic taxation of the kind imposed. The court, in overruling that contention and sustaining the validity of the tax, said (p. 27): "The cab service is rendered wholly within the state and has no contractual or necessary relation to interstate transportation. It is either preliminary or subsequent thereto. It is independently contracted for, and not necessarily connected therewith. But when service is wholly within a state it is presumably subject to state control. The burden is on him who asserts that, though actually within, it is legally outside the state; and unless the interstate character is established, locality determines the question of jurisdiction."

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Under section 2 of the railroad's rules and regulations it is provided that baggage checks " will only be issued to destination of ticket, or to points where stopovers are allowed, and only *via* route of ticket; " and by section 30b it is provided that agents " must not under any circumstances take baggage beyond the destination of transportation presented." But as to " special delivery baggage " section 33 is as follows: " Special delivery check [such as was given to plaintiff] is designed for the checking of baggage from any line station to residence, hotels, steamboat piers or railroad stations in the cities shown in the following schedule. Special delivery charges should be prepaid." And then follows " Westcott Express Company, New York City," with rates according to zones in the borough of Manhattan. The plaintiff's bag was delivered to the defendant by the railroad at the railroad's terminal in New York, and of the charge of forty cents the defendant's share was thirty-six cents. These facts authorize the conclusion that in the shipment in question the railroad acted as the agent of defendant.

The railroad company as principal would not have been liable to the plaintiff as upon a through shipment, because in the absence of a special contract for a through shipment a common carrier is not liable for a shipment beyond the terminus of its own route, and the baggage check did not evidence a special contract. *Soviero* v. *Westcott Express Co.*, 47 Misc. Rep. 596. The respondent claims, however, that by the Carmack amendment (U. S. Stat. at Large, §§ 1905–1907, chap. 3591) enacted subsequently to the decision of the Soviero case, the railroad company and the defendant were connecting carriers, and that, therefore, the railroad company became liable to plaintiff as upon a through shipment. But that position is not tenable, for it has

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been decided that a local baggage carrier like the defendant, although performing services connected with interstate passenger traffic, is not a common carrier or express company subject to the provisions of the act to regulate commerce. *Matter of Frank Parmalee Company,* 12 Int. Com. Rep. 40; *Wylie* v. *Northern Pacific R. Co.,* 11 id. 145.

Further, the railroad company failed to prove that its schedules were posted at Tuxedo, and such posting appears to be a requirement of the federal act in default of which the statutory limitation is not operative. In any event the limitation of liability in the Erie tariff was not intended for defendant's benefit and did not apply to defendant, because the concurrence of the defendant under section 6 of the act was not shown, and its name is not in the list of participating carriers. There was no warrant, therefore, for giving the defendant the benefit of the interstate commerce limitation in the Erie tariff; and the law of New York governs the disposition of the controversy.

Section 38 of the Public Service Commissions Law provides that common carriers, including transportation companies, are liable for the full value of property carried as baggage, "but the value in excess of one hundred and fifty dollars shall be stated upon delivery to the carrier, and a written receipt stating the value shall be issued by the carrier, who may make a reasonable charge for the assumption of such liability in excess of one hundred and fifty dollars."

In *Robinson* v. *N. Y. C. & H. R. R. R. Co.,* 145 App. Div. 391; affd., 203 N. Y. 627, it was held that the limitation is not available to carriers unless they inquire of passengers the value of their baggage, and that a failure to make such inquiry is a waiver of the benefits of the provision. See *Meister* v. *Woolverton,* 140 App. Div. 926. As the uncontradicted evidence in this case

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is that the plaintiff was not asked to state the value, the limitation is not operative.

Judgment modified by increasing the amount to $250 and appropriate costs in the court below, together with $25 costs of this appeal, and, as so modified, affirmed.

COHALAN and WHITAKER, JJ., concur.

Judgment modified, and, as so modified, affirmed, with costs.

MARY L. DURBROW, Appellant, *v.* SWEDISH IRON AND STEEL CORPORATION, Respondent.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Corporations — negotiable instruments — when not accommodation makers of note — trial.

Where a corporation becomes a party to negotiable paper for accommodation, the burden is upon the holder of showing that he became such for value and without notice that the corporation was an accommodation maker.

In an action on the note, evidence that the corporation gave it to one of its debtors under an arrangement pursuant to which it took a mortgage on the payee's machinery, tools, etc., and an assignment of accounts together with certain notes of the payee received in exchange for the note in suit, by which arrangement it was hoped that defendant through financial assistance given the payee would receive full payment of its indebtedness to defendant, if believed by the jury, would authorize a finding that the note in suit was not an accommodation note, upon which finding plaintiff, a holder for value, would be entitled to recover.

APPEAL by the plaintiff from a judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, dismissing the complaint.

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Albert W. Meisel, for appellant.

Blair & Rudd (Arthur B. King, of counsel), for respondent.

GUY, J. There were two questions to which plaintiff directed her proof at the trial: (1) whether the execution and delivery of the note in suit signed in the name of the defendant corporation by its vice-president only was authorized or ratified by the defendant; (2) whether the note was an accommodation note.

While the note was not signed by the treasurer and countersigned by the president, as prescribed by defendant's by-laws, the evidence given and offered in support of plaintiff's case was sufficient *prima facie* to establish that the execution of the instrument was authorized or ratified by the defendant.

Although, as a rule, corporations are without power to bind themselves as accommodation parties, so that where it appears that a corporation became a party to a negotiable paper for accommodation the holder has the burden of showing that he became such holder for value and without notice that the corporation was an accommodation party (*Abbot* v. *LePrevost,* 166 App. Div. 40; *Jacobus* v. *Jamestown Mantel Co.,* 211 N. Y. 154), the proof given and offered in support of the cause of action tended to show that the note in suit, to the order of the G. W. Bradley Ax and Tool Co., Inc., was given to the payee in exchange for notes of the tool company as part of a plan which included the execution and delivery to the maker by the payee of a chattel mortgage upon its machinery, tools and equipment, and an assignment of the payee's accounts against third persons, by which arrangement it was hoped that the defendant, through financial assistance given the payee, would receive full payment of the

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indebtedness of the tool company to defendant. This testimony, if believed by the jury, would authorize a finding that the note in suit was not an accommodation note, upon which finding the plaintiff, a holder for value, would be entitled to a recovery.

In *Carlaftes* v. *Goldmeyer Co.*, 72 Misc. Rep. 75, the indorsement was not made or given in connection with any business transaction with the defendant in that action, and this court, following the decision in *National Park Bank* v. *German American M. W. & S. Co.*, 116 N. Y. 281, held that, although collateral security was given to that defendant in consideration of its indorsement, the transaction was *ultra vires* and no recovery could be had. Here, however, as before stated, the note, according to the evidence given and tendered, appears to have been given for a valuable consideration, which included notes of the payee not returned at the time of the trial, in connection with the business transactions of the defendant and for the purpose of enabling it to collect its indebtedness against the payee.

It follows that the dismissal of the plaintiff's complaint was error, and the judgment must be reversed and a new trial ordered, with thirty dollars costs to appellant to abide the event.

COHALAN and WHITAKER, JJ., concur.

Judgment reversed and new trial ordered, with thirty dollars costs to appellant to abide event.

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ELENA GUTTILLA, Appellant, *v.* ALFRED S. ENGEL and SIMON ENGEL, as Executors and Trustees under the Last Will and Testament of MARTIN ENGEL, Deceased, Respondents.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Costs — appeal — Code Civ. Pro. § 461.

Under section 461 of the Code of Civil Procedure which is not inconsistent with the Municipal Court Code and which provides that one granted leave to sue as a pauper shall not be prevented from prosecuting the action by reason of his being liable for the costs of a former action brought by him against the same defendant, an order granting a stay in the action until payment of costs awarded to defendant on dismissal of the complaint in a former action between the same parties involving the same cause of action is unauthorized and will be reversed and the motion denied.

APPEAL by plaintiff from an order of the Municipal Court of the city of New York, borough of Manhattan, second district.

Joseph A. Boccia (Orestes S. Alacchi, of counsel), for appellant.

Isidor Cohn, for respondents.

GUY, J. Plaintiff appeals from an order granting a stay herein until payment of costs awarded to defendant on the dismissal of plaintiff's complaint in a former action between the same parties involving the same cause of action. Subsequently to the entry of judgment dismissing the complaint in the former action, plaintiff obtained an *ex parte* order granting him leave to sue as a pauper. The fact of the dismissal of the

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complaint in the former action and the nonpayment of costs awarded to defendant was not brought to the attention of the court in connection with plaintiff's motion for leave to sue as a pauper; but no motion has since been made by defendant to vacate the order on that ground. While section 125 of the Municipal Court Code provides for a stay, without further direction of the court, until the payment of costs which have been awarded, that section must be read in conjunction with section 461 of the Code of Civil Procedure, which, not being inconsistent with the provisions of the Municipal Court Code, must be deemed a part of the Municipal Court Code (Mun. Ct. Code, § 15). Section 461 specifically provides that a person to whom leave to sue as a pauper is granted "shall not be prevented from prosecuting the same by reason of his being liable for the costs of a former action brought by him against the same defendant." This provision of the Code is conclusive on this point. *Roberti* v. *Carlton,* 18 How. Pr. 466; *Harris* v. *Mutual Life Ins. Co.,* 18 N. Y. Civ. Pro. 195; *Young* v. *Nassau Elec. R. R. Co.,* 34 App. Div. 126.

The order must, therefore, be reversed and the motion denied, without costs of appeal.

COHALAN and WHITAKER, JJ., concur.

Order reversed.

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GERALD MULINOS, Appellant, v. HARRY WALKOF, Impleaded with Others, Respondent.*

(Supreme Court, Appellate Term, First Department, May, 1916.)

Pleading — defense of new matter — allegations contained in complaint — denial — answer.

False imprisonment — action for — pleading — criminal law.

A defense of new matter within the purview of section 500 of the Code of Civil Procedure must be based on the theory of confession and avoidance and should not contain a denial except where a denial of the existence of some fact alleged in the complaint is necessary in order to perfect the answers as a complete affirmative defense, and in determining the sufficiency thereof all the allegations of the complaint not denied thereby are deemed admitted even though elsewhere denied by the answer.

A complaint alleging that while defendant, a city marshal, was making a levy under an execution against one person he levied on and seized the property of another and upon being informed by plaintiff that said property belonged to his employer falsely and maliciously charged plaintiff with interfering with him and caused his arrest and by direction of defendant was imprisoned and restrained of his liberty without reasonable cause and without any right or authority, states a cause of action for false imprisonment.

The complaint further alleged that defendant falsely and maliciously charged plaintiff with using threatening, abusive and insulting behavior with intent to provoke a breach of the peace and that plaintiff was arraigned on said charge before a police magistrate and duly tried and the charge dismissed. For a separate defense the answer alleged that while defendant, as marshal, was attempting to levy an execution upon personal property of a judgment debtor plaintiff and others interfered with him in the performance of his duty; that defendant called a police officer in whose presence plaintiff continued to interfere with defendant and committed a breach of the

* See 93 Misc. Rep. 189.—[REPR.

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peace, whereupon the police officer arrested plaintiff and took him before a magistrate who discharged him. There was no denial of any of the allegations of the complaint incorporated in the separate defense though they were denied by the answer. Held, that as there was no denial of the allegation of the complaint that defendant caused plaintiff's arrest, the separate defense was subject to demurrer for insufficiency.

That defendant had reasonable cause to believe that plaintiff had committed a breach of the peace, as alleged, was no defense, and although it might affect the damages it would not justify the imprisonment of plaintiff.

APPEAL by plaintiff from order of the City Court of the city of New York overruling demurrer to defense.

Herman Kahn, for appellant.

Harry M. Peyser, for respondent Walkof.

GUY, J. The complaint alleges that while the defendant Walkof, a city marshal, was making a levy and seizure under an execution against one George Mulinos he entered the place of business of one Helen Mulinos and attempted to and did levy on and seize property of Helen Mulinos for satisfaction of the said execution; that the plaintiff, an employee of Helen Mulinos, informed the marshal that the business and property belonged to Helen Mulinos and not to the judgment debtor, but the said defendant thereupon falsely and maliciously charged plaintiff with interfering with him and then caused plaintiff's arrest; and plaintiff was thereupon at the direction of said defendant taken into the custody of a police officer, conducted to one of the police stations and thereafter to a magistrate's court, where he was imprisoned and restrained of his liberty; and the said defendant falsely and maliciously charged plaintiff with " using threatening, abusive and insulting behavior with intent to provoke a breach of

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the peace and whereby a breach of the peace might have been occasioned;" that thereafter and on the evening of the same day the plaintiff was arraigned before a police magistrate and on said charge was duly tried, and that the said charge was thereupon dismissed and the plaintiff discharged from custody; and that the plaintiff was in the manner described imprisoned and restrained of his liberty for upwards of five hours, without reasonable cause, and without any right or authority.

The material allegations of the complaint are denied by the answer, and for a separate and distinct defense the defendant alleges that at all the times mentioned in the complaint the defendant was a city marshal; that as such marshal, having in his possession an execution duly issued upon a judgment against George Mulinos, he attempted to levy upon certain personal property of said George Mulinos, whereupon the plaintiff and others interfered with him as such marshal in the performance of his duty; that the defendant thereupon called a police officer of the city of New York; that in the presence of the police officer the plaintiff continued to interfere with the defendant and committed a breach of the peace, "whereupon the said police officer did cause his arrest and brought him before a magistrate;" that at the magistrate's court defendant charged plaintiff with a breach of the peace, "and that said magistrate did thereupon discharge the plaintiff from arrest;" and that all of the aforesaid acts were done by the defendant without malice and in the performance of his duties as an officer, "and that the defendant had reasonable and probable cause to cause the arrest of the plaintiff and prosecute him before said magistrate." There is no denial of any of the allegations of the complaint incorporated in the defense.

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Plaintiff demurred to the defense as insufficient upon its face; defendant moved for an order overruling the demurrer, and apparently upon the theory that the complaint alleges merely a cause of action for malicious prosecution the court below made the order appealed from granting defendant's motion.

Plaintiff's grievance is set out in the complaint in the form of a single count and he insists that the cause of action alleged is one simply for false imprisonment, and that whatever the cause or causes of action the failure of the defendant to incorporate in the separate defense denials of the material allegations of the complaint justifies the demurrer.

Under the rules laid down in this department respecting the vexed question of the proper manner of pleading defenses, it has been decided that a defense consisting of new matter, within the purview of section 500 of the Code, must be based on the theory of confession and avoidance, and be such as cannot be proved under the denials; that a denial has no place in an affirmative defense, except when it becomes necessary to deny the existence of some fact alleged in the complaint in order to perfect the answers as a complete affirmative defense; that an affirmative defense, as distinguished from a mere denial, is a separate plea, and in determining its sufficiency all the allegations of the complaint not denied in the separate defense, even though elsewhere denied by the answer, are deemed admitted. *Mendelson* v. *Margulies,* 157 App. Div. 666; *Einstein* v. *Einstein,* 158 id. 498; *Pullen* v. *Seaboard Trading Co.,* 165 id. 117. The application of these rules condemns the defense in this case, for in the absence of denials in the separate defense, although contained elsewhere in the answer, all of the averments of the complaint are deemed to be admitted in so far as the defense is concerned.

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While it has been held by the Court of Appeals, however (*Staten Island M. R. R. Co.* v. *Hinchliffe,* 170 N. Y. 473), that as the demurrer assumes the truth of the facts alleged in defendant's plea, if such facts, even though provable under the prior denials not incorporated in the defense, would defeat the cause of action, the defense is not demurrable, though it may be stricken out upon motion as redundant; and the doctrine of the case cited was applied in this department in *Kraus* v. *Agnew,* 80 App. Div. 1, even under the test there laid down the defense in this action is insufficient. The pleader has stated a cause of action for false imprisonment, for not only does the complaint allege that plaintiff was imprisoned and restrained by defendant of his liberty, but it also contains the allegation that the imprisonment was without right or authority, and such allegation amounts to an averment that the arrest was unlawful. *Ring* v. *Mitchell,* 45 Misc. Rep. 493. And see *Gearity* v. *Strasbourger,* 133 App. Div. 701. Assuming, but not deciding, that a cause of action for malicious prosecution is also stated, the defendant by neglect to make timely motion for the separate statement of the causes of action has waived the right given by the Code of Civil Procedure. *Gearity* v. *Strasbourger, supra.*

Although it is alleged in the defense that the plaintiff committed a breach of the peace in the presence of the police officer, "whereupon the said police officer did cause his arrest and convey him before a magistrate," it does not follow that the defendant also did not cause the plaintiff's arrest, nor is that allegation of the complaint denied in the separate defense, and, indeed, it is subsequently averred that the defendant had reasonable and probable cause to cause the plaintiff's arrest; and it at least presumptively appears from defendant's admission that the magistrate upon

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inquiring into the cause discharged the plaintiff from arrest, that the plaintiff did not commit a breach of the peace. In so far as a cause of action for malicious prosecution is concerned, the discharge of the plaintiff would not necessarily be inconsistent with the existence of probable cause for the prosecution (*Reiss* v. *Levy*, 165 App. Div. 1); but the charge made against the plaintiff not being a felony, reasonable cause for belief on the part of the defendant, a peace officer, that plaintiff committed a breach of the peace, if in fact he did not commit such a breach, although it might affect the damages, would not justify the imprisonment complained of, for reasonable cause is mentioned only in the third subdivision of section 177 of the Code of Criminal Procedure, which covers the case of arrest without a warrant where a felony has been in fact committed by the person arrested. *Gold* v. *Armer*, 140 App. Div. 73; *Smith* v. *Botens*, 36 N. Y. St. Repr. 55.

So, that even under the more liberal rule of construction applied in the *Hinchliffe* and *Kraus* cases, defendant's affirmative plea was not a complete defense to the whole complaint (*Butler* v. *General Acc. Assur. Assn.*, 103 App. Div. 273) and the demurrer should not have been overruled.

BIJUR and COHALAN, JJ., concur.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

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HENRY A. STRAUSS, Appellant, v. ARTHUR WOLFSOHN CO., INC., Respondent.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Contracts — of employment — sales — evidence — appeal.

Where plaintiff's contract of employment as a salesman provided that he should receive a stipulated amount each week irrespective of commissions earned, he is not a debtor for the deficiency of commissions and his drawing account may only be offset against commissions actually earned.

In an action for wrongful discharge, defendant is not entitled to counterclaim for the amount of plaintiff's drawings in excess of his earned commissions, though the contract provides for a monthly statement showing "either in debit and credit columns, settlements to be made monthly," where the only statement furnished by defendant was given more than five months after plaintiff's discharge.

It was no part of plaintiff's case to affirmatively show that employment was sought for and could not be found, and although his testimony as to efforts in that regard were contradictory he was entitled to the most favorable inferences of which the evidence was capable, on appeal from a judgment dismissing the complaint, as the burden of proof was on defendant to show that plaintiff had procured or could have found other employment.

APPEAL by plaintiff from a judgment of the City Court of the city of New York, dismissing complaint.

Price Brothers (Valentine Taylor, and Morris I. Price, of counsel), for appellant.

Rosenthal & Heermance (S. Michael Cohen, of counsel), for respondent.

GUY, J. The action is to recover damages for wrongful discharge. The complaint alleges that on or about December 22, 1913, the defendant hired plaintiff as a salesman for one year from December 8, 1913, on a

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commission basis; that by said contract defendant agreed to pay plaintiff fifty-five dollars a week during the life of the agreement, to be charged against the commission earned by the plaintiff; and that on or about May 29, 1914, plaintiff was without cause discharged from the employment.

In view of the admission of plaintiff's counsel that the letter written by defendant to plaintiff, and "accepted" over plaintiff's signature, "embodies the terms of the agreement entered into between the plaintiff and defendant," it is unnecessary to consider the rulings of the trial judge excluding oral evidence tending to show what the contract was. The plaintiff testified that he was discharged on May 29, 1914.

The contract embodied in the writing presents the usual features in salesmen's contracts — a stipulated commission and a drawing account against commissions accruing from sales. It also contains the provision: "We will issue a monthly statement showing the merchandise shipped for your account with commissions credited to your account and drawing account deducted showing your balance either in debit and credit column settlements to be made monthly."

On cross-examination defendant put in evidence a statement covering the period from the beginning of the employment down to May 23, 1914, showing total drawings $1,338, from which are deducted $165.98 commissions, making a balance debit of $1,172.02, for which defendant counterclaimed.

At the close of plaintiff's case the court granted defendant's motion to dismiss on the ground that plaintiff failed to make out a cause of action under the pleadings. The ruling requires a reversal of the judgment.

Ignoring for the moment the provision calling for monthly settlements, the plaintiff under the contract was entitled to receive fifty-five dollars each week, irre-

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spective of the amount of commissions earned; he was not a debtor for the deficiency of his commissions; and the drawing account could only be offset against commissions actually earned. *Durante* v. *Raimon,* 136 App. Div. 448; *Miller* v. *Blaisdell Machinery Co.,* 83 Misc. Rep. 35; *Levay* v. *Goldwasser,* 75 id. 461. As this court said in the case last cited (p. 462): "The fact that, so far as appears, plaintiff had earned no commissions before his discharge affords no basis for dismissing the complaint, inasmuch as he might have earned in the ensuing weeks commissions sufficient to make up any deficiency theretofore resulting between his earned commissions and the amount of his weekly drawings." In that case the plaintiff had drawn $1,005.67, and apparently was entitled to no commissions, and sued for the total of the stipulated weekly drawings during the balance of the contract period.

Respondent claims, however, that because the agreement in this case contains the provision for a monthly statement showing the balance "either in debit and credit columns, settlements to be made monthly," as the statement put in evidence showed that plaintiff's drawings exceeded his earned commissions, the plaintiff thereupon became liable to pay the balance, and failure on the part of the plaintiff to make payment of such balance justified the discharge.

The provision referred to must be read and construed in the light of the whole contract and the interpretation which the courts have placed on this class of contracts, and, so considered, it cannot be given the construction placed upon it by the respondent. Evidently it was not the intention of the parties that there should be a monthly settlement in the sense contended for by the respondent, for the only statement furnished by defendant to plaintiff was the one in May, when he had worked for the defendant for over five months.

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Under the other provisions of the contract plaintiff was not required to make any payment to defendant by reason of the excess of his drawings over commissions, and it does not seem to have been within the contemplation of the parties by the use of the words "settlements to be made monthly" to so change the character of the agreement as to impose a personal liability on plaintiff to defendant for any such excess.

In *Samuels* v. *Bloom*, 91 Misc. Rep. 7, the employer agreed to "loan and advance" to the employee a weekly sum, to be charged against his commissions, and it was held that the employer had no cause of action against the salesman for the amount overdrawn.

In *Auerbach, Inc.*, v. *Ramer*, 80 Misc. Rep. 645, the contract provided for the advance of a weekly amount on account of commissions, "which said advances shall be charged to the personal account of the employee, and shall, as hereinbefore provided, be deducted from the earnings of the employee;" and the employer at the end of the contract period sued to recover the excess of the advances over commissions. The City Court overruled a demurrer to the alleged cause of action, and this court, reversing the judgment and sustaining the demurrer, said: "If the parties had it in their minds to make the defendant pay back any excess of advances, they certainly would have said so. It would have been a simple matter, and it is incomprehensible that such a simple provision should have been omitted if the parties had intended otherwise." The reasoning of that decision seems directly applicable to the present controversy.

Although plaintiff's testimony seems contradictory with reference to efforts claimed to have been made by him to procure other employment after his discharge, this feature of the case concerns the amount of his damages, and it was no part of the plaintiff's case to

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show affirmatively that employment was sought for and could not be found, the burden of proof being upon the defendant to show that plaintiff had procured or could have found other employment elsewhere (*Milage* v. *Woodward*, 186 N. Y. 252); and the plaintiff being entitled to the most favorable inferences of which the evidence is capable the infirmity of his proof in this regard did not require a dismissal of the complaint.

BIJUR and COHALAN, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

L. HORATIO BIGLOW, JR., Trustee of the Byron Company, in Bankruptcy, Respondent, *v.* FRANK PRESBREY COMPANY, Appellant.

(Supreme Court Appellate Term, First Department, May, 1916.)

Goods sold and delivered — action for — agent not liable to trustee in bankruptcy for value of goods.

An agent of a hotel corporation who obtains for plaintiff, another corporation, at the request of its president an order from his principal for the purchase of goods to be paid for by giving credit for board and lodging of said president, is not liable to the trustee in bankruptcy of plaintiff for the value of the goods.

APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, fifth district, rendered in favor of plaintiff.

Wilder, Ewen & Patterson (John Ewen, of counsel), for appellant.

Reese D. Alsop, for respondent.

GUY, J. Defendant appeals from a judgment entered in favor of plaintiff by direction of the court after a

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trial without a jury in an action to recover for goods sold and delivered, consisting of certain postal cards advertising the Biltmore Hotel.

The complaint alleges that plaintiff's assignor, the Byron Company, prior to the appointment of plaintiff trustee for the benefit of creditors, sold and delivered to the defendant, at its special instance and request and upon its promise to pay therefor, certain goods, wares and merchandise consisting of post cards, of the agreed price and reasonable value of $429.40, no part of which has been paid.

The answer sets up a general denial and two separate defenses: *First,* that the post cards in question were ordered for the Biltmore Hotel and paid for; *second,* that the post cards were ordered by the defendant, as advertising agent, to be provided for the said Biltmore Hotel, a domestic corporation, and that when the order was given it was agreed that payment should be made, not in cash, but by the Biltmore Hotel giving credit to the Byron Company and its president, one C. L. Chester, for board and lodging, and that such credit was given in pursuance of the agreement and in payment of the account.

The facts are undisputed.

The evidence does not establish any privity of contract between plaintiff and defendant, but, on the contrary, that defendant merely undertook, at the request of plaintiff's president, to " get them the order from the Biltmore to the Byron Company for 30,000 postal cards " to be paid for in board, and that defendant did get such order on the terms proposed by defendant's president. It is clear that it was not the intent of the parties that defendant should assume any liability individually for the value of the goods, but merely that it should obtain for plaintiff an order from defendant's principal, on the terms proposed by plaintiff.

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It is not for this court to consider what cause of action, if any, plaintiff may have against the Biltmore corporation, or what defenses, such as ratification or estoppel, might be interposed in such an action. Plaintiff failed to make out a cause of action against the defendant.

The judgment must, therefore, be reversed, with thirty dollars costs, and the complaint dismissed with costs.

BIJUR and COHALAN, JJ., concur.

Judgment reversed, with thirty dollars costs.

TIMOTHY D. GLEESON, Respondent, *v.* JOSEPH UMANS, as Trustee of the Charles L. Doran Contracting Company, Appellant.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Corporations — insolvency — services — contracts.

Plaintiff, acting for and on behalf of an insolvent corporation under a contract made through its attorney before defendant was appointed custodian of its assets, obtained a purchaser therefor. Held, that when plaintiff had proven his claim for the agreed compensation for his services he would be in a position to enforce it against the proceeds of the sale of the assets in the hands of defendant as trustee for the creditors of the corporation.

APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, borough of Bronx, first district, rendered in favor of the plaintiff.

Cohen Brothers (Lawrence B. Cohen, and Myron L. Lesser, of counsel), for appellant.

Benjamin Franklin, for respondent.

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GUY, J. Upon the day set for trial, the parties appeared in open court and the following facts were conceded by the respective parties and placed upon the record. Plaintiff's counsel stated in substance that one of the attorneys for the Doran Contracting Company, which company was at that time insolvent, employed the plaintiff to obtain a purchaser for the assets of said company; that plaintiff did procure a purchaser for said assets who paid therefor the sum of $1,050; that the agreed compensation for such services was five per cent, amounting to the sum of $52.50; that there was two years' interest due thereon, and said sum was paid over to this defendant as trustee for the creditors of said company who still holds the same for the benefit of such creditors.

The defendant's attorney then stated that at the time of the foregoing transactions the plaintiff did not know Umans, the defendant, that he had no dealings with him and that all of such dealings were conducted with one Abberly, who was then the attorney for said Doran Company, and that all of said transactions were complete before the appointment of this defendant as trustee for said creditors. Upon these statements the court below rendered judgment in favor of the plaintiff.

This was an erroneous disposition of the case. It will be seen, from the concessions made, that the defendant is a mere holder of the proceeds of the assets of the Doran Company for the benefit of its creditors, of which the plaintiff is apparently one. The plaintiff acted for and on behalf of the Doran Company under a contract made through its attorney, Abberly, before defendant had been appointed custodian of the assets. Plaintiff had no relations whatever with defendant, was not known or employed by him and in no view of the facts shown could there be any contract or privity of employment between the plaintiff and the defend-

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ant. It is true that the defendant has possession of the proceeds of the sale of the assets of the company but that alone does not render him liable upon plaintiff's claim. Plaintiff's claim is against the Doran Company for his services and when such claim is proven he will then be in a position to enforce it against the fund in the defendant's possession as trustee for such creditors.

None of the cases cited by plaintiff are in point or apply to the situation as here existing.

BIJUR and COHALAN, JJ., concur.

Judgment reversed, with thirty dollars costs, and complaint dismissed with costs.

THE A. CAMPAGNA CONSTRUCTION CO., Appellant, *v.* ALBERT H. WOODS, Respondent.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Lease — renewal for further term — evidence in action to recover rent — failure to establish waiver of written notice.

Where a lease ending September 30, 1915, provides for a renewal for a further term unless either party should on or before June 1, 1915, give written notice of intention to surrender the premises or have possession of the same on September 30, 1915, and the evidence in an action to recover the rent for the month of October fails to establish a waiver by plaintiff of the written notice, a motion for the direction of a verdict in favor of plaintiff should have been granted.

APPEAL by plaintiff from a judgment of the Municipal Court of the city of New York, borough of Manhattan, seventh district, rendered in favor of defendant; and from an order denying plaintiff's motion to set aside the verdict of the jury and for a new trial.

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Davis, Symmes & Schreiber (William B. Symmes, Jr., and Robert C. Ryder, of counsel), for appellant.

House, Grossman & Vorhaus (Charles Goldzier, of counsel), for respondent.

GUY, J. Plaintiff appeals from a judgment entered in favor of defendant upon the verdict of a jury as to plaintiff's second cause of action; and from an order denying plaintiff's motion for a new trial.

The complaint alleged two causes of action. A judgment in favor of the plaintiff on the pleadings was directed as to plaintiff's first cause of action. The second cause of action, upon which a verdict was rendered in favor of the defendant, was for rent, $150, of premises belonging to plaintiff and occupied by the defendant for the month of October, 1915, under the same written lease as was alleged in connection with the first cause of action.

The primary lease between the parties was from January 1, 1914, to September 30, 1915, and contained a provision "that the letting and hiring shall be extended and renewed for the further term of two years from September 30, 1915, *unless either the landlord or tenant shall on or before the* 1*st day of June,* 1915, *give notice in writing to the other of an intention to surrender the premises or have possession of the premises on the* 30*th day of September,* 1915." No written notice of intention to surrender or have possession on September 30, 1915, was given by either the landlord or tenant prior to June 1, 1915.

The evidence establishes that prior to June 1, 1915, negotiations were entered into between plaintiff and defendant as to a renewal of the lease on terms different from the original lease, but such negotiations did not result in any meeting of the minds of the parties.

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Defendant's wife testified that during such negotiations one of plaintiff's officers told her that her husband need not give any notice of his intention not to renew, and that she reported this fact to her husband; and it was contended on the trial and is contended on this appeal that such statement to defendant's wife constituted a waiver of the terms of the original written lease, a document under seal. The evidence of defendant's wife and of the defendant himself is entirely indefinite as to the time when such alleged statement by an officer of the plaintiff to defendant's wife was communicated to defendant, and there is no evidence whatever that defendant relied on such statement. There is also an explicit denial by said officer of the plaintiff corporation that he made such a statement to defendant's wife, and defendant in a letter written to plaintiff on July 24, 1915, nearly two months after the date when under the terms of the original written lease there would, in the absence of notice by either party, be an automatic renewal of the lease for two years, stated: "I had expected to receive leases for my apartment next year, but learned from your office this day that the one I have renews itself automatically." It is clear from this written statement of the defendant that there was no meeting of the minds of the parties as to the making of a different lease, and that defendant understood nearly two months after June 1, 1915, that the lease was automatically renewed for two years on the same terms as the original lease. The defense of waiver was, therefore, not established and there was no issue of fact to be submitted to the jury, and the learned trial court erred in denying plaintiff's motion for a direction in favor of the plaintiff.

BIJUR and COHALAN, JJ., concur.

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The judgment on plaintiff's second cause of action must, therefore, be reversed, and judgment directed in favor of plaintiff for the full amount, with thirty dollars costs of appeal and costs in the court below.

NATHAN A. KOMMEL and Another, Respondents, *v.* EMANUEL BISGYER, Appellant.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Affidavits — conflicting — evidence — service of summons or process — appeal.

Under section 129(1) of the Municipal Court Code which provides that "Upon proof by affidavit or otherwise that a judgment has been taken or a final order made without service of summons or process the judgment or final order must be vacated and set aside by the court in the district where it was entered," the court in determining the question of service may take the testimony of witnesses offered by either party or it may decide the question upon affidavits.

Where the affidavits are conflicting and apparently of equal weight, the Appellate Term, on appeal from an order denying a motion to vacate a judgment taken by default, may order an oral examination if one was denied by the lower court, but the right to decide the matter upon affidavits is unquestionable.

APPEAL by the defendant from an order of the Municipal Court of the city of New York, borough of Manhattan, seventh district, denying a motion to vacate a judgment and for the trial of an issue raised by affidavits.

E. Jacob Bisgyer, for appellant.

Julius Fischer, for respondents.

GUY, J. The defendant herein, claiming never to have been served with a summons in this action,

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obtained an order to show cause why the judgment taken upon default should not be vacated.

This order was based upon an affidavit made by the defendant, to the effect that he had never been served with the summons in this action and had no knowledge that a judgment had been taken against him until levy was made under the execution. The return day of the motion was set for March 8, 1916. On that day the plaintiff presented the affidavit of the process server who swore to the service upon the defendant on December 30, 1915. One of the plaintiffs made an affidavit in which he testified that during the first week of January, 1916, the defendant called at his place of business and "told me that he was surprised to see that I had him served with a summons and complaint; that I know very well that he was good for the amount demanded in the complaint and asked that I give him time to pay the amount;" that at that time defendant gave him several post dated checks for the amount due, all of which were paid except the last one for twenty-nine dollars which had been returned from the bank marked "payment stopped;" that after the return of this check, so indorsed, he instructed his attorney to proceed under the judgment. In this statement he was corroborated by the affidavit of his bookkeeper who testified she was present at the interview between the plaintiff and the defendant and heard what the defendant said.

The court thereupon denied the motion to vacate the judgment. It is recited in the order that the "motion made in open court that the testimony of the process server be taken and that said process server identify the man whom he served with the summons herein and that the testimony of the defendant herein be also taken as to such purported service be and the same is hereby denied."

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The appellant asks for a reversal upon the ground that the court below erred in denying this motion and in refusing to permit a hearing upon the issue of service. Under the former Municipal Court Act, the only way of determining whether or not a defendant had been served with a summons was by a trial of the issue raised by a traverse of the return, and it could not be determined upon a motion alone, and that is the tenor of all the cases cited by the appellant in this case. That practice, however, has been changed by the Municipal Court Code. Section 129, subdivision 1, provides that "Upon proof by affidavit or otherwise that a judgment has been taken or a final order made without service of summons or process, the judgment or final order must be vacated and set aside by the court in the district where it was entered."

It will be seen that the court below may now determine the question of service of process "by affidavit or otherwise" which means that the court may take oral testimony of the witnesses offered by either party or it may decide the question upon affidavits. In a case where the affidavits are conflicting and apparently of equal weight, an oral examination may be desirable and the best method to determine the question, and no doubt this court could in such a case, upon appeal, order such a hearing to be had, if one was denied by the lower court, but the right to decide the matter upon affidavits is unquestionable, and there is no reason in this case for disturbing the decision.

BIJUR and COHALAN, JJ., concur.

Order affirmed, with ten dollars costs.

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MARY GALLAGHER, Appellant, v. ABRAHAM HALPERN, Respondent.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Negligence — when burden on defendant to show freedom from — evidence — appeal.

In an action for personal injuries the evidence on behalf of plaintiff must be taken as true on the hearing of an appeal from a judgment dismissing her complaint.

Where in an action to recover for personal injuries it appears that a purchaser of goods in defendant's store fell through a door in the floor, which door when closed came even with the floor but which had evidently been left opened, the burden is upon defendant to show his freedom from negligence, as he impliedly invited plaintiff upon the premises which were under his entire control.

APPEAL by the plaintiff from a judgment of the Municipal Court of the city of New York, borough of Manhattan, seventh district, dismissing the plaintiff's complaint at the close of the plaintiff's case.

Robert A. McDuffie, for appellant.

Jacob M. Cohen, for respondent.

GUY, J. This case was tried before the court with a jury. At the close of the plaintiff's case, on motion of the defendant's attorney, the complaint was dismissed. In such a case the testimony of the plaintiff and the witnesses called on her behalf must be taken as true. The action is brought to recover for personal injuries received by the plaintiff through the alleged negligence of the defendant. The defendant keeps a store in this city for the sale of carpets, oil cloths, linoleum, etc.

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On the 9th day of November, 1914, at about six o'clock in the evening, the plaintiff entered the store for the purpose of purchasing some linoleum. While she was examining the goods the telephone bell rang and the defendant who was showing the goods went to the place where the telephone was kept, at the same time saying to plaintiff "you look along there, and see if you see another piece that will suit you better than the one you have chosen." As plaintiff was walking along examining some of the other pieces, she suddenly fell through a hole in the floor, the door of which when closed came even with the floor, but which had evidently been left open. She received injuries for which she was under medical treatment for some time. She was corroborated by one witness who was apparently disinterested. It was shown that the opening in the floor was in the rear of the store, about five feet from the rear wall, and that the store in that part was dimly lighted at the time of the accident. A mere recital of these facts shows that the defendant was put upon his proof as to his freedom from negligence under the circumstances shown. He had impliedly invited the plaintiff upon his premises and they were under his entire control. The rule in such cases is that where the thing is shown to be under the control and management of the defendant, or his servants, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. *McNulty* v. *Ludwig & Co.*, 153 App. Div. 206, and cases there cited.

BIJUR and COHALAN, JJ., concur.

Judgment reversed, and new trial ordered, with thirty dollars costs to appellant to abide event.

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CECELIA LEVINE, Appellant, v. WILLIAM G. LEVINE and JOHN PRESS, Impleaded, Respondents.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Verdict — when error to set aside — trial.

It is error to set aside a verdict merely because the trial judge did not agree with the jury.

APPEAL by plaintiff from order of the Municipal Court of the city of New York, borough of Manhattan, fifth district, setting aside verdict in favor of plaintiff.

John J. Vause, for appellant.

Marcus Helfand (David Tim, of counsel), for respondents.

GUY, J. The action was commenced by wife against husband for the replevin of certain articles of property which prior to their separation furnished their home. The wife claimed that some of these articles were presents given to her on her engagement and marriage to the defendant, and that the balance of the property, referred to in the case as household furniture, was purchased by her husband to furnish the home and then given to the plaintiff. All of the property was taken from the possession of the husband's brother-in-law John Press, and he thereupon filed an affidavit claiming title thereto, and an order was entered making him a party defendant.

A day and a half were occupied in taking the testimony of the parties and their witnesses, and the case was submitted to the jury in a charge which defendants' counsel stated covered the points of the contro-

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versy, and no exception was taken by defendants to any part of the charge. The jury found for the plaintiff, and the learned trial judge on defendants' motion, without handing down an opinion, made an order setting aside the verdict on the ground that it was "against the weight of evidence."

The case was peculiarly one for the consideration of a jury, and while loath to interfere with the order of the trial judge, who saw the witnesses and heard them testify, a careful examination of the record fails to show any special circumstance which justified the exercise of the discretionary power of the trial judge in favor of defendants, except the mere fact that he did not agree with the jury in their verdict. This was insufficient to warrant the order appealed from, for in the absence of reversible error, or other conditions showing an abuse of the power vested in the jury, their verdict is in contemplation of law final. *Wagner* v. *H. Hermann Lumber Co.*, 121 N. Y. Supp. 607; *Dallin* v. *Maper*, 122 App. Div. 676.

BIJUR and COHALAN, JJ., concur.

Order reversed and judgment ordered on the verdict, with thirty dollars costs of the appeal.

BRADSTREET'S COLLECTION BUREAU, a Corporation, Appellant, *v.* NAGLER'S BRASS WORKS, INC., Respondent.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Jurisdiction — Municipal Court Code, § 15.

While the Municipal Court of the city of New York under section 15 of the Municipal Court Code may vacate a judgment entered in a case tried without a jury, the court has no jurisdiction to dismiss the complaint on the merits.

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APPEAL by the plaintiff from an order of the Municipal Court of the city of New York, borough of Manhattan, first district, which vacates and sets aside a judgment after a trial before a justice without a jury, and dismisses the complaint.

A. Frank Cowen (Bernard Cowen, of counsel), for appellant.

Harry E. Herman, for respondent.

GUY, J. This case was tried before the court without a jury and a judgment rendered in favor of the plaintiff on the 12th day of January, 1916. Subsequently by an order entered on the 7th day of February, 1916, the justice who tried the case vacated and set aside the judgment and dismissed the complaint upon the merits. The power to do this is attacked upon this appeal.

Section 6, subdivision 7, of the Municipal Court Code declares that that court has power "To vacate, amend, correct or modify any process, mandate, judgment, order or final order, in the furtherance of justice, for any error in form or substance; to grant a new trial upon any of the grounds for which a new trial may be granted by the supreme court in an action pending therein, including the grounds of fraud and newly discovered evidence." The Appellate Term in the second department, in the case of *Petsche* v. *MacDonald*, 94 Misc. Rep. 655, by a divided court, has held that the section above referred to confers power upon the Municipal Court, in a case tried without a jury, to vacate a judgment and order a new trial, although thus conferring upon that court more power than is possessed by the Supreme Court. Without expressing an opinion upon that question, we are

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reluctantly constrained to follow that decision in order to preserve uniformity in the two departments so far as possible, but it is nowhere suggested nor can authority be found for the right of a justice of the Municipal Court, not only to vacate a judgment rendered by him after a trial without a jury, but in addition thereto dismiss the complaint upon the merits, thus not only reversing himself, but precluding the plaintiff from beginning another action for the same cause. Notwithstanding the Municipal Court has been declared a court of record, it still remains a statutory court with such power only as is given by statute within the limits of the Constitution of the state. *Schmitt* v. *Querengaesser*, 94 Misc. Rep. 640.

The respondent claims such power is given under section 1317 of the Code of Civil Procedure but that section applies to appellate courts only.

Order modified by striking therefrom the words "the complaint dismissed upon the merits with costs" and adding thereto the words "and a new trial granted," and, as so modified, affirmed, without costs to either party.

BIJUR and COHALAN, JJ., concur.

Order modified, and, as so so modified, affirmed, without costs.

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FIFTY-NINTH STREET REAL ESTATE COMPANY, Respondent, v. FRANCIS P. MURPHY, Individually, and as Receiver of the Rents and Profits of Property No. 344 West Seventy-second Street, New York City, Appellant.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Foreclosure — mortgages — to what receiver of rents, etc., entitled — contracts.

The receiver of the rents, issues and profits under a foreclosure of a mortgage on an apartment house is not entitled as against the mortgagor to telephone tolls collected from the tenants for messages sent to the exchange located in the building, as the money so received was not earned by the real estate but under a contract with the telephone company.

Such receiver is, however, entitled as against the mortgagor to the amount collected for electric current furnished to the tenant from a plant which was a part of the realty.

APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, ninth district, rendered in favor of the plaintiff.

Gabriel L. Hess, for appellant.

Bennett E. Siegelstein (William L. Stone, of counsel), for respondent.

GUY, J. This action was brought to recover from the defendant who is the receiver of the rents, issues and profits, under a foreclosure of a mortgage upon an apartment house known as the " Chatsworth " in this

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city, the sum of $255.52, being the amount collected by the defendant from the tenants of said house for electric current furnished them.

The facts are not disputed. The plaintiff is the owner of the equity of redemption — the record owner of the premises.

The electric current furnished the tenants was manufactured on the premises, by a plant maintained thereon and a part thereof. The defendant, as receiver, took possession of the premises on April 30, 1915, and the bills for electric light were then due. Plaintiff rests its right to recover from the defendant upon two claims: *First,* that the electric current so furnished the tenants is not embraced in the terms "rents, issues and profits" and therefore the defendant has no right thereto, and, *second,* that the plaintiff refrained from collecting said bills and allowed the defendant to do so upon his promise to collect the same and turn them over to the plaintiff.

In July, 1915, this plaintiff brought an action against this defendant to recover for telephone tolls collected by him from the several tenants and recovered a judgment therefor which was affirmed upon appeal by this court. Not reported. In December, 1915, in another action between the same parties to recover for sums charged the owners of property adjoining the Chatsworth for electric current, light, telephone service, hot and cold water, etc., the owners of the adjoining property having paid the sum due into court the judgment in favor of the receiver was modified by this court, upon appeal, by deducting the sums charged for telephone service and affirmed as to the other charges. Not reported.

In that action it was determined by this court that the plant in the Chatsworth was a part of the realty, and that whatever it produced was within the rents,

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issues and profits, which the receiver was authorized to collect. The distinction between the two causes of action is clear. The first action was for telephone tolls, the messages being sent through a trunk line, the exchange being located in the Chatsworth, and connections being made through such exchange. This being the case the receiver could not recover such charges, as they were no part of the rents, etc., as the money was not earned by the real estate, but through a contract with the telephone company.

In the second case, as in the present case, the charges are for commodities furnished directly by the plant, which is part of the realty, and charges for services in this case are, therefore, for the "rents, issues and profits" arising from the use of such realty. The learned trial justice held that the promise made by the defendant, which was disputed, to collect the said charges and pay them over to the plaintiff, was binding as under the law "forbearance to assert a legal right is a good foundation for a promise by a third party to pay." When the record is examined, however, it will be found that this principle is sought to be applied to the following incident. Plaintiff's secretary testified as follows: "I told the receiver that I had a claim against the tenants for electric light furnished * * * and that I intended to render bills to the tenants for those charges, but that if it would cause him any inconvenience and confusion I would let his agent collect them for me if he turned it over. The receiver told me that he thought that would be the best plan * * * and he would see that these amounts were collected and turned over to me when collected." I do not interpret this as evidence of more than an arrangement as to the convenience of the two parties, but if it can be regarded as a contract it is merely

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one involving the physical collection and turning over of certain funds.

Manifestly the right of the receiver to the fund was not either involved or intended to be determined by the arrangement; moreover, it is equally plain that he undertook no personal obligation in this respect whatever.

BIJUR and COHALAN, JJ., concur.

Judgment reversed, with thirty dollars costs, and complaint dismissed, with costs.

FRANKLIN BIEN, Respondent, *v.* NATIONAL SURETY COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Judgments — what constitutes — motions and orders — appeal.

Upon the entry of an order granting leave to discontinue a Municipal Court action the clerk of the court noted in the docket book that the action had been discontinued on motion of plaintiff and that the disbursements were taxed and allowed, and later an order was granted striking out the taxation of disbursements. Held, that the entries in the docket book were made merely in the routine of the clerk to keep a record of the proceedings and did not constitute a judgment from which an appeal could be taken.

A judgment may not be entered on an order granting leave to discontinue an action.

APPEAL by the defendant from a purported judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, bringing up for review an order granting plaintiff's motion for a retaxation of costs.

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Mervyn Wolff (Benjamin Jaffe, of counsel), for appellant.

Franklin Bien, plaintiff-respondent, in person.

GUY, J. The facts in this case are not disputed and it involves a question of practice only. The action was brought to trial and it seems the only material question was one of law. The case was submitted and the trial justice reserved his decision.

Before a decision was rendered the plaintiff asked leave to discontinue the action and the trial justice made and signed an order, the material portion of which reads as follows: "Upon the foregoing papers this motion is granted and the plaintiff is allowed to discontinue upon payment of taxable costs." The summons was also indorsed "Discontinued on payment of taxable costs. March 11th, 1916."

This order was entered on the day it bore date and the clerk thereupon entered in the docket book kept by him the following:

"1916 Mch. 11 Discontinued on motion of pltf. $20. costs. Trial fee paid. See memo.

" " 15 Disbursements, tax and allowed $8,00."

By motion made by the plaintiff and returnable on April 11, 1916, the court below made an order "Striking out the taxation of $8.00 disbursements and re-taxing bill accordingly." The clerk thereupon made this entry in the docket:

"1916 Apr. 11 Disbursements retaxed disallowing the $8. disbursements as taxed by Clerk."

This is all that appears in the record before us.

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Characterizing these entries as a "judgment" the defendant appeals therefrom and seeks a review of the last-mentioned order which strikes out the clerk's allowance of disbursements from the bill of costs.

The plaintiff moves to dismiss the appeal upon the ground that no judgment as yet has ever been entered.

In this position we think the plaintiff is correct. The order granting leave to discontinue was upon condition that plaintiff pay the taxable costs. Upon such an order no judgment can be entered. *Hyde* v. *Anderson,* 112 App. Div. 76.

"Motion to discontinue is properly for leave to discontinue, and the proper order thereon is one allowing a discontinuance on payment of costs, if such terms are imposed. If plaintiff fails thereafter to take proper steps or proceed in the action, defendant's remedy is by motion to dismiss the complaint for want of prosecution. There is no authority for entering a judgment." *Hyde* v. *Anderson, supra; Anderson* v. *Norton,* 158 N. Y. Supp. 152.

Under the terms of the order in the present case, the defendant undoubtedly had a right to tax his costs, leaving the plaintiff to pay such costs or refuse to proceed when a proper judgment of dismissal could be entered, the costs taxed thereunder and a review had by the court below or upon appeal by the aggrieved party. The entries in the docket book do not constitute a judgment. The clerk is a mere ministerial officer and can only act upon the direction of the court. He was given no authority to enter a judgment and his entries were merely in the routine of his duty to keep a record of the proceedings. He cannot enter a judgment of his own motion. He must have either oral or written directions from the justice who tried the case. *Collins v. Davis,* 114 N. Y. Supp.

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792. Indorsement of the decision of the trial justice on the papers in the case is not rendering judgment. *Dalton* v. *Loughlin*, 4 Abb. N. C. 187; *Collins* v. *Davis*, *supra*. See also Code Civ. Pro., § 1236.

BIJUR and COHALAN, JJ., concur.

Appeal dismissed, with ten dollars costs.

FREDERICK DEDERS, Respondent, *v.* JOSEPH M. WOOD, Appellant.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Pleading — in action on contract — counterclaim — Municipal Court Act, § 151.

Trial — refusal to permit trial to proceed — evidence — appeal.

Under section 151 of the former Municipal Court Act, which provided that a counterclaim must be a cause of action arising out of the contract or transaction set forth in the complaint or in an action on contract any other cause of action on contract existing at the commencement of the action, defendant in an action to recover wages as a chauffeur may counterclaim his damages for conversion of his car by plaintiff.

Where the attention of the trial judge was called by defendant's counsel to the fact that his introduction of evidence had not been completed, even though the court had stated that judgment would be entered in favor of plaintiff it was its duty to recall such statement and permit the trial to proceed until counsel had finished with his defense, and the refusal of the court to do so was prejudicial and deprived defendant of a substantial right calling for the reversal of a judgment in favor of plaintiff.

APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of Bronx, second district, rendered in favor of plaintiff.

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Louis J. Rosett (Allan A. Deutsch, of counsel), for appellant.

George R. Simpson (Louis Susman, of counsel), for respondent.

GUY, J. Defendant appeals from a judgment entered by direction of the court in favor of plaintiff, after a trial without a jury, in an action brought to recover wages alleged to be due plaintiff for services as a chauffeur from July 24, 1914, to August 10, 1914.

The pleadings were oral, but each side served written bills of particulars.

Plaintiff testified that in November, 1913, he was employed by the defendant Wood as chauffeur at a salary of twenty dollars a week, and continued in his employment until July 15, 1914, when defendant, who still owned the car, turned the car over to one Levine under an arrangement which gave Levine the right to hire the car and divide the profits with the defendant Wood; that he worked for Levine up to and including July twenty-third, and worked again for defendant Wood from July 24 to August 10, 1914.

Defendant testified that plaintiff was continuously in his employ from the time of the original hiring up to the date of his discharge on August 10, 1914, and sets up as a separate defense breach of duty toward the defendant, his employer, and violation of instructions, in that on or about the 20th of July, 1914, in violation of express instructions given to plaintiff as defendant's employee, plaintiff took defendant's auto upon a trip to Stamford, Conn., with a party of other persons unknown to defendant, and that upon said trip defendant's auto was damaged to an extent that necessitated the expending of $170 for repairs, which

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defendant seeks to recover against plaintiff as a counterclaim.

Plaintiff did not testify to any conversation held with defendant terminating his employment at the time the defendant entered into the arrangement with Levine, or to any conversation or correspondence resulting in the renewal of his employment by the defendant, and plaintiff's testimony on that point is merely a conclusion of the witness.

The uncontradicted evidence of the defendant is that by his arrangement with Levine to rent his car out to others the garage expenses, gasoline bill and plaintiff's pay should first be deducted, and Levine receive 10 per cent. of the net results of the hirings, the other 90 per cent. to go to defendant.

On all the evidence it is clear that plaintiff was an employee of the defendant at the time he took defendant's auto to Stamford in direct violation of his employer's orders, and that in doing so and using defendant's auto for his own purposes he was guilty of conversion, by reason of which the defendant was damaged the amount of the bill for repairs resulting from such wrongful use and conversion of defendant's property.

Defendant does not deny that plaintiff continued in his employ for a considerable period subsequent to the injury to the car, and plaintiff's testimony as to the length of time stands, therefore, uncontradicted. Plaintiff made out a *prima facie* case of employment during the period from July 24, 1914, to August 10, 1914, which, inasmuch as defendant saw fit to continue the employment after the alleged conversion, would have entitled the plaintiff to wages during that period had there been no counterclaim set up for damages for the conversion of defendant's car by the plaintiff. If such counterclaim for damages resulting from tort

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can be set up in an action on contract, then defendant was entitled to go to the jury on his counterclaim and introduce proof in support thereof.

It is contended by plaintiff that under the old Municipal Court Act, which was in effect at the time of the trial of this action on January 8, 1915, a counterclaim for tort could not be interposed in an action on contract, and that therefore the issues presented by the counterclaim were not properly at issue. This contention, however, cannot be sustained. Section 151 of the former Municipal Court Act provides that a counterclaim must be "(1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action; (2) In an action on contract, any other cause of action on contract, existing at the commencement of the action." A cause of action for conversion cannot, therefore, be made a counterclaim in an action upon contract unless it arises out of the same transaction, or is connected with the subject of the action. *De Forest* v. *Andrews,* 27 Misc. Rep. 145.

The counterclaim which defendant interposed herein does relate to the cause of action set up in plaintiff's complaint, namely, the employment of plaintiff by defendant and the performance of his duties by plaintiff for the defendant; and the tort alleged in the counterclaim is of the nature of a tort growing out of contract, the tort consisting of the wrongful, dishonest and unfaithful manner in which plaintiff performed his duties, and in converting to his use the defendant's property placed in his possession in connection with his employment by the defendant. There was, therefore, on the evidence, so far as defendant was permitted to introduce evidence, two issues of fact on defendant's counterclaim which should have

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been submitted to the jury: *First,* was plaintiff in the employment of defendant at the time of the alleged conversion and wrongful use of defendant's auto by plaintiff; *second,* was such conversion or use to which plaintiff put the property of defendant authorized by defendant either directly or through Levine? In directing a verdict for plaintiff the learned trial judge, therefore, committed reversible error. It also appears that defendant was not permitted to complete the introduction of evidence, but according to the corrected record, which has been verified by the trial judge, before he had rested and at the conclusion of the testimony of one of defendant's witnesses, the court directed judgment in favor of plaintiff, saying: "I have heard enough;" and when defendant's counsel remonstrated and stated he had other evidence to introduce, refused to allow him to proceed further. When the attention of the court was called by counsel to the fact that his introduction of evidence had not been completed, even though the trial court had already stated that judgment would be entered in favor of plaintiff, it was his duty to at once recall such statement or direction and permit counsel to proceed with the trial of the case until he had finished with his defense. While doubtless this was a mere inadvertence or misunderstanding on the part of the trial judge, it deprived the defendant of a substantial right and must be deemed to have been highly prejudicial.

The judgment must, therefore, be reversed and a new trial ordered, with thirty dollars costs to appellant to abide the event.

BIJUR and COHALAN, JJ., concur.

Judgment reversed and new trial ordered, with thirty dollars costs to appellant to abide event.

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RIEGAL SACK COMPANY, Appellant, v. TIDEWATER PORTLAND CEMENT COMPANY, Respondent.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Pleading — allegations contained in complaint — contracts — damages — evidence — carriers — Personal Property Law, § 145.

Allegations of the complaint in an action for breach of contract to buy certain cement sacks, that plaintiff was at all times ready and willing to perform the agreement with respect to furnishing, selling and delivering the sacks and would have done so but for defendant's cancellation, notification, neglect and refusal to perform the contract on his part, are sufficient to show that plaintiff was able to perform if performance had not been prevented by defendant.

An allegation of plaintiff's readiness, ability and willingness to perform the contract must be supplemented by an allegation of tender of performance or a waiver thereof by defendant.

Where a complaint sets forth a cause of action on contract to sell goods and to deliver them when ordered within a certain time, an allegation of defendant's cancellation of outstanding orders and its refusal to give further orders is sufficient to show a breach of the contract, and a notification that defendant would not order or accept any further deliveries constitutes a waiver of further tenders where it is further alleged that plaintiff was to manufacture the goods to fill the orders.

The court in such case cannot presume that the cancellation of the contract was wrongful.

Where it appears that plaintiff up to the time of defendant's refusal to accept the sacks, and its cancellation of outstanding orders, had duly performed all other conditions of the contract and was ready to furnish, sell and deliver sacks in accordance with the terms of the agreement, the issue whether defendant's refusal was wrongful was sufficiently raised by the complaint though not expressly alleged.

The plaintiff, under section 145 of the Personal Property Law, was entitled to prove its damages if defendant's refusal to accept the sacks was wrongful, without proof that it manufactured or bought the bags.

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The contract being silent as to the time of delivery of the sacks after an order therefor had been given, it would be implied that such delivery was to be made within a reasonable time.

Whether defendant's cancellation of its order to deliver a second car-load and its refusal to give further orders were justified after notice from plaintiff that it could not deliver the second car-load for two or three weeks was a question for the jury, there being nothing in the evidence to permit an inference that in the circumstances such a delivery would not be within a reasonable time.

APPEAL from a judgment of the City Court of the city of New York dismissing its complaint and from an order of the City Court granting defendant's motion to dismiss the complaint and for judgment on the pleadings, upon which order the judgment appealed from was entered.

Rollins & Rollins (Alfred A. Wheat, of counsel), for appellant.

Parker, Davis & Wagner (Arnold L. Davis and N. Raymond Heater, of counsel), for respondent.

LEHMAN, J. The plaintiff brought an action for breach of contract. The complaint alleges that the plaintiff and the defendant entered into an agreement in writing whereby "the defendant agreed to purchase from the plaintiff, and the plaintiff agreed to furnish, sell and deliver to the defendant at Union Bridge, Maryland, two hundred and fifty thousand seven-ounce first quality Osnaburg cement sacks, and the defendant agreed to pay the plaintiff for said sacks the sum of $82.50 per thousand; and it was further agreed by the terms of said contract that delivery of the said sacks was to be made as ordered by the defendant between June 22, 1914, and December 31, 1914.

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" That the said sacks were to be manufactured by the plaintiff at Jersey City, New Jersey, and were to be transported therefrom and delivered to the defendant at Union Bridge, Maryland, and that said agreement related wholly to interstate commerce.

" That plaintiff duly performed all the conditions of said agreement on its part to be performed except the furnishing, sale and delivery of the 169,182 sacks hereinafter mentioned, and furnished to the defendant under said agreement and as ordered by it, 80,818 of the said sacks, which were accepted and paid for by the defendant, but the defendant, prior to the 31st day of December, 1914, cancelled all outstanding orders theretofore given and notified the plaintiff that it would not order or accept from the plaintiff the remaining 169,182 sacks or pay therefor, and neglected and refused to order, accept or pay for the same. That plaintiff was at all times ready and willing to perform the said agreement on its part with respect to furnishing, selling and delivering the said 169,182 sacks and to furnish, sell and deliver the same in accordance with the terms of said agreement, and would have furnished, sold and delivered said 169,182 sacks to defendant according to the terms of the said agreement, but for defendant's cancellation, notification, neglect and refusal.

" That by reason of the defendant's said default, the plaintiff was damaged in the sum of $3,806.60, no part of which has been paid, except the sum of $1,903.30, although the balance thereof has been duly demanded."

The answer in addition to certain denials sets up as a " separate defense " that on or about October 7, 1914, the defendant by letter ordered plaintiff to make up at once a carload of said sacks and requested plaintiff to notify the defendant by return mail when same

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would be ready for shipment. That plaintiff on the following day notified the defendant that it would be unable to deliver the sacks so ordered by defendant for two or three weeks and the defendant thereupon cancelled its said order for a carload of cement sacks and said notice of cancellation was given in writing. "That because of plaintiff's failure and refusal to deliver said carload of sacks in accordance with the terms and provisions of said contract, defendant was compelled to purchase said carload of sacks which would number about 84,500 elsewhere. That it was mutually understood and agreed between the parties hereto that plaintiff could and would ship to defendant a carload of cement sacks in four or five days after receipt of order for same but would like ten days' notice at the most in which to make delivery of a carload of sacks." Annexed to the answer are all the writings which passed between the parties.

The plaintiff filed a reply to this so-called separate defense in which it admitted most of the material allegations in the answer except that it sets forth —"Answering the allegations in paragraph eight of said answer, the plaintiff admits that under ordinary circumstances from four to ten days after receipt of an order would be a reasonable time within which to make delivery of the bags referred to; admits that the plaintiff requested the defendant to give it at least ten days' notice of its required shipments of bags and admits that the defendant, on or about the 30th day of July, 1914, promised to give the plaintiff at least ten days' notice of all required deliveries of bags, and that on or about the 7th day of October, 1914, the defendant notified the plaintiff that it would not require of the plaintiff any further shipments of bags until the latter part of December, 1914; but, except as admitted, denies that there was any agreement between

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the parties with respect to the delivery of said bags except that said bags should be delivered within such time after receipt of an order therefor as was reasonable under all the circumstances then existing; and except as admitted, denies each and every other allegation contained in said paragraph eight."

The reply also states "Further replying, plaintiff alleges that prior to the 7th day of October, 1914, defendant notified plaintiff that it would place an order for a carload of the sacks under the existing contract between the parties, provided the plaintiff would alter the terms thereof so that payment therefor could be made in thirty days instead of ten days, which plaintiff refused to do, and thereupon defendant notified plaintiff that it would not order any of said bags until the latter part of December, 1914, and did not prior to the 7th day of October, 1914, withdraw or modify said notice, and plaintiff accepted and relied thereon. That the reasonable time for the plaintiff to manufacture and deliver to the defendant the said carload of bags under the circumstances existing on the 7th day of October, 1914, was from two to three weeks."

At the opening of the trial the defendant made a motion to dismiss the complaint on the ground that it failed to set forth a cause of action. A discussion followed between court and counsel and in the course of that discussion it developed that after the plaintiff had received the cancellation of the order of October seventh it gave orders to stop manufacturing the sacks and that the defendant thereafter did not order any more sacks but made a settlement in regard to the third carload. After this discussion the trial judge granted judgment to the defendant upon the pleadings and upon the "agreed facts."

In granting this judgment he stated in effect, that

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he felt that the judgment so ordered was correct and that the procedure adopted was calculated to bring up before this court for review, in the most speedy and economical manner, the questions that were doubtful in this case. Both parties acquiesced in this procedure but the record shows clearly that the case was not actually submitted to the court for any final decision upon an agreed state of facts. The discussion shows that the defendant claimed *first,* that the complaint sets forth no cause of action; *second,* that if the complaint does set forth a cause of action then the pleadings taken together with the agreed facts show, as a matter of law, that the defendant never breached the contract; and *third,* that if it did breach the contract the plaintiff would not, under the pleadings and the agreed facts, be able to show any damages. The purpose of the procedure adopted was to finally determine these questions as matters of law and if the pleadings, as amplified by the agreed facts, still leave any issues open, then the plaintiff is entitled to a reversal.

The defendant claims that the complaint fails to set forth a cause of action in that it does not set forth that the plaintiff was able to perform; or that the cancellation by the defendant was wrongful. The complaint sets forth that the plaintiff was at all times "*ready and willing* to perform the said agreement on its part with respect to furnishing, selling and delivering the said 169,182 sacks and to furnish, sell and deliver the same in accordance with the terms of the agreement and would have furnished, sold and delivered the said 169,182 sacks to defendant according to the terms of the said agreement but for defendant's cancellation, notification, neglect and refusal." There seems to me to be no doubt but that these words are sufficient to show that the plaintiff was able to perform. There is strong authority in cases decided in

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other jurisdictions for the view that an allegation of readiness to perform implies also ability to perform and in this case the allegation that the plaintiff was ready and willing to perform is supplemented by the allegation that it would have performed but for the defendant's cancellation, notification, neglect or refusal. These allegations, in my opinion, are amply sufficient to show that the plaintiff was able to perform, if performance had not been prevented by the defendant. The cases in this state which the defendant cites are not contrary to this view. They hold only that an allegation of readiness or willingness or of readiness, ability and willingness to perform is not equivalent to an allegation of tender of performance. In this case the plaintiff must also allege either a tender of performance or waiver by the defendant of such a waiver. He has attempted to allege such a waiver by alleging an anticipatory breach of the contract in the words "but the defendant prior to the 31st day of December, 1914, cancelled all outstanding orders theretofore given and notified the plaintiff that it would not order or accept from the plaintiff the remaining 169,182 sacks or pay therefor and refused to order, accept or pay for the same." It seems to me that where the complaint sets forth a cause of action upon a contract to sell goods and to deliver them when ordered within a certain time, an allegation of a cancellation of outstanding orders and a refusal to give any further orders is sufficient to show a breach of the contract and a notification that the defendant would not order or accept any further deliveries was a clear waiver of further tenders, especially in view of the allegation that the plaintiff was to manufacture the goods to fill the order. The defendant urges however that this is true only if the allegations of the complaint show that the cancellation and refusal to order

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or accept was wrongful and that the court cannot presume that a cancellation made is a wrongful cancellation. As a rule of law this statement is correct, but it has no application to the case at bar. The cancellation of outstanding orders is not made the basis of this action. The breach claimed is the refusal to order or accept the sacks and the cancellation of outstanding orders is material only upon the point whether such refusal was, as a matter of law, wrongful if the plaintiff had, up to that time, duly performed all the other conditions of the agreement, and was ready to furnish, sell and deliver these sacks "in accordance with the terms of the agreement." The complaint sets forth all these facts and the conclusion that the cancellation of outstanding orders and the refusal to give any further orders were wrongful necessarily follows as a matter of law. The defendant seems throughout to misunderstand the legal effect of these allegations of the complaint and has set forth as a separate and affirmative defense allegations which constitute really a denial of the allegations on the part of the plaintiff that at the time of the cancellation it was ready and willing to furnish and deliver and would have furnished and delivered the remaining sacks "*in accordance with the terms of the agreement*" if the defendant had not notified it of its cancellation of outstanding orders and refusal to accept further deliveries. Under these allegations of the complaint the plaintiff sufficiently raises the issue of whether the refusal was wrongful. If this refusal was wrongful then there is no doubt but that plaintiff may prove its damages as provided in section 145 of the Personal Property Law without proof that it actually manufactured or bought the bags.

The only question which requires consideration is whether, upon the agreed facts, the defendant's can-

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cellation of its order to deliver the second carload and its refusal to give a new order were justified as a matter of law; in other words, whether under the agreed facts the plaintiff was ready, able and willing to deliver the sacks in accordance with its contract. The contract is silent as to the time of delivery after an order was given and therefore a term will be implied in the contract that such deliveries should be made in a reasonable time. Both sides agree that under ordinary circumstances a reasonable time would be from four to ten days. It is further agreed that the plaintiff notified the defendant that it could not deliver the bags ordered for two or three weeks. The defendant contends that under these circumstances it was justified, as a matter of law, in refusing to accept such a delivery. That contention, however, is unsound, for the plaintiff claims that these bags were not ordered under ordinary circumstances but that prior to the giving of the order the defendant notified it that it would not order any bags until December. If such notification was given it would not constitute a modification of the contract but it would be material upon the question of what would be a reasonable time for delivery of the bags under those particular conditions. There is nothing in the record which would permit the inference that under those circumstances a delivery of these sacks two or three weeks thereafter would not be within a reasonable time. The plaintiff is entitled under its pleadings to have this issue determined by the jury.

Judgment should, therefore, be reversed and a new trial ordered, with costs to appellant to abide the event.

PENDLETON and WHITAKER, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

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JACOB HANAUER, as Sole Surviving Member of the Firm of LEVISON & HANAUER, Trading as Commercial Trades Co., Respondent, *v.* BRADSTREET'S COLLECTION BUREAU, a Corporation, Appellant.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Evidence — credibility of witness — corporations — when new trial may not be granted.

While a party has a right to contradict the testimony of his own witness he may not impeach his credibility.

In an action against a corporation, the original certificate of its incorporation executed more than a year before the trial and disclosing that a witness for plaintiff, who testified that he was not a director at the time when certain admissions in regard to the collection of moneys were made by him, was one of the original directors was not newly discovered evidence for which a new trial may be granted, it appearing that if plaintiff thought he would need it he could have "discovered" the said certificate before the trial.

Where a party chooses to rely on an adverse witness to supply a necessary link in his chain of evidence and then finds that his confidence was misplaced, he should not be granted a new trial to supply other evidence which he could have obtained at the trial.

APPEAL from an order of the Municipal Court of the city of New York, borough of Manhattan, first district, vacating a judgment in favor of the defendant and granting a new trial.

A. Frank Cowen (Bernard Cowen, of counsel), for appellant.

I. Gainsburg, for respondent.

LEHMAN, J. The plaintiff brought an action against the defendant and at the trial he sought to prove his

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case by showing that one of the defendant's directors had made certain admissions in regard to the collection of moneys. In order to prove that the person making these alleged admissions was a director of the defendant he called this man as his own witness and this witness flatly denied that he was a director. The trial justice thereupon dismissed the complaint for failure of proof without prejudice to a new action. Thereafter the plaintiff procured the original certificate of the defendant's incorporation which showed that the witness was one of the original directors. This certificate was executed over a year before the trial. The plaintiff then moved for a new trial on the ground of newly discovered evidence and this motion was granted. The defendant now appeals from this order.

There seem to me to be two reasons why a new trial should not have been granted. The judgment was not granted upon the merits but for failure of proof. The plaintiff knew in advance that he must prove that the person making the alleged admission was a director. He presented this man as his own witness and though he had a right to contradict this witness he could not impeach his credibility. This witness has testified that he was not a director at the time when the alleged admission was made. He was not asked nor is it material whether he was a director at the time of the incorporation. If a new trial takes place and the plaintiff presents the certificate of incorporation, such evidence would not establish the material element of the plaintiff's case that this man was a director at the time the alleged admission was made, especially in view of the explanation that he became a director only for the purpose of incorporation and never served thereafter. Even with that paper in the record there would still be a failure of proof on this material point.

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Moreover, I do not think that this certificate can properly be called newly discovered evidence even if it would change the result. The plaintiff would have "discovered" it before the trial if he had thought he would need it. He thought, however, that he would not need it because he could furnish evidence on the same point through the alleged director. He failed to get this proof from his witness and therefore the case was dismissed. In effect, therefore, the plaintiff is asking the court to grant him a new trial to put in evidence proof to supply a defect in his previous proof. Where a party chooses to rely upon an adverse witness to supply a necessary link in his chain of evidence and then finds that his confidence was misplaced, he should not be granted a new trial to supply other evidence which he could have obtained before the trial. The plaintiff does not seriously dispute these rules but claims that by means of this certificate he can cross-examine the witness and show that his testimony was perjured. Unfortunately, however, for the plaintiff, the witness whom he desires to cross-examine is his own witness, and the judgment rests not upon fraudulent testimony but upon an actual failure of proof.

PENDLETON and WHITAKER, JJ., concur.

Order reversed, with thirty dollars costs, and motion denied and judgment of dismissal reinstated.

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GABRIEL MUHLSTEIN, Appellant, v. THE NEW YORK CENTRAL RAILROAD COMPANY, Respondent.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Conversion — action for damages for — presumption of lawful possession — evidence.

Where in an action to recover damages for the conversion of certain brass journal railroad bearings which bore the initials of certain railroad companies, including defendant, and part of which was at one time its property, it appears that plaintiff bought the property from a regular dealer in such articles the presumption that plaintiff's possession was lawful may be rebutted only by affirmative proof that the one who sold the brass to plaintiff never had title thereto.

APPEAL by the plaintiff from a judgment of the Municipal Court of the city of New York, borough of Manhattan, seventh district, in favor of the defendant, after a trial without a jury.

Morris Cukor, for appellant.

Alexander S. Lyman (Jacob Aronson, of counsel), for respondent.

LEHMAN, J. The plaintiff sued for the conversion of certain brass railroad journal bearings. It is not disputed that these bearings were taken by the defendant from plaintiff's possession. It is also not disputed that the plaintiff had bought these goods from a third party. It is clear that the possession of the goods by the plaintiff under the circumstances disclosed was presumptive evidence that lawful title was in him. The brass bearings bore the initials of certain railroad companies including the defendant and I think that the evidence is sufficient to show that at least part of these bearings was at one time the prop-

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erty of the defendant. This evidence, however, is clearly not sufficient to rebut the presumption that the plaintiff's possession was lawful unless the evidence also shows that the defendant did not part with this property or if it did sell this property to a third party the third party did not sell the property. In other words the presumption that the plaintiff's possession was lawful can be rebutted only by affirmative proof that the person who sold the brass to the plaintiff never had any title to it. I agree that upon this record the evidence produced by the defendant is sufficient merely to throw suspicion upon the plaintiff's good faith and perhaps on his title but in nowise affirmatively shows that his title was bad and in nowise impeaches the credibility of the testimony of the plaintiff that he was in possession of the goods by purchase from a third party. For these reasons I agree that the judgment should be reversed but I think that the defendant is entitled to a new trial. The record shows that the defendant took this brass acting upon the belief that it was stolen. It has attempted to show justification for this belief by testimony intended to show that at least a large part of the brass was its property at one time; that it never sold any brass of this nature to any party except the manufacturer; and that the manufacturer did not sell any brass of this kind to third parties. If the testimony produced had actually shown these facts, then, of course, it would follow that the plaintiff's possession was unlawful. The testimony however is not sufficient for this purpose for two reasons. It does not show that *all* the brass marked like the brass taken from plaintiff's possession was sold to the manufacturer and it does not show that the manufacturer *never* sold such brass to third parties. In view however of the nature of the testimony actually produced and the suspicion which

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does rest upon the plaintiff's good faith, I think that the defendant is entitled to an opportunity to supply this testimony. Judgment should therefore be reversed, and a new trial ordered, with thirty dollars costs to appellant to abide the event.

PENDLETON, J., concurs.

WHITAKER, J. (concurring). This action was brought to recover damages for the conversion of certain brass railroad journal bearings, also known as car boxes, which property plaintiff had purchased from a regular dealer in such articles, and which were in the actual possession of plaintiff in his place of business on May 8, 1915, on which day the property was taken away from plaintiff's possession by the agents of and under orders of defendant, without plaintiff's permission, and turned over to the defendant. The alleged ground for taking these goods was that they had been stolen from defendant.

There is no question as to the value of the property.

It appears that similar articles are dealt in in the open market; that plaintiff is a second-hand dealer in such articles; that plaintiff came lawfully into possession of the goods having purchased them in the open market, and there is no evidence whatever from which it may be legally inferred that plaintiff knew the goods had been stolen.

That after defendant had taken the goods from the possession of plaintiff a proper demand was made for their return. As to sixty-three pieces of the goods taken, defendant made no claim to title, but delivered them to other persons, from whom defendant claimed they had been stolen, of which theft, however, there was no evidence.

The possession of the goods by the plaintiff under

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the circumstances disclosed by the evidence was presumptive of a lawful title in him and was amply sufficient upon which to base his action for conversion. *Yardum* v. *Wolf*, 33 App. Div. 247.

As matter of fact the evidence clearly established ownership in the plaintiff unless it could be shown by competent and sufficient evidence that the goods had been stolen.

The burden of showing that the goods had been stolen was upon the defendant who was required to establish the fact by clear and satisfactory evidence. This we think the defendant failed to do.

A summary of the evidence introduced by the defendant is as follows: The evidence of the detectives, who visited the plaintiff's place of business, concerning certain minor instances, which were perhaps capable of casting a slight suspicion upon plaintiff's actions and which were substantially contradicted by plaintiff's witnesses.

Warnoch, the chief sales agent of the defendant of all old discarded material in New York, testified that it was the custom never to sell the goods similar to the goods in question to any other person than the Magnus Metal Company who manufactured them, and that no such goods to his knowledge had ever been sold to others. This testimony was weakened by the admission of the witness that at times he did call for orders for purchase of second-hand materials, and, on one occasion only, for orders for similar articles to those in question.

There is no evidence that the Magnus Metal Company did not resell the articles it purchased of the defendant.

Defendant invoked section 123 of chapter 14 of the code of ordinances of the city of New York, which provides that every junk dealer shall keep a book in

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which shall be entered at the time of purchase a description of the articles purchased, name, residence, etc., of the person from whom purchased, day and hour of such purchase, which book shall be open to inspection.

The plaintiff testified that he had a book and his bookkeeper testified that she had not put the goods in it because they had not been sorted, that she always waited until they had been sorted, so that she could describe them before she entered them.

The defendant took these goods away before they had been sorted.

The failure to comply immediately with the section referred to would not overcome the presumption of title which a purchase in the open market, followed by actual possession, raises. The law will not assume a crime has been committed or that goods have been stolen. Such facts must be established by credible and satisfactory evidence.

There is no such evidence in this case.

The judgment should be reversed, with thirty dollars costs, and judgment ordered for plaintiff, with costs.

Judgment reversed, with thirty dollars costs.

ANNIE EDELSON, Respondent, *v.* METROPOLITAN LIFE INSURANCE COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Insurance (life) — provisions of policy of — misstated age — evidence.

Where a policy of insurance providing that if the age of the assured be misstated the amount payable should be such as the premium paid would have purchased at the correct age was issued upon the assumption that the insured was then sixty

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years of age, as stated in his application, when in fact he was sixty-six years of age, a recovery on the policy is limited to the amount of insurance the premium paid would have purchased at the correct age as the parties by their contract agreed.

The application for insurance though not attached to the policy was material and competent evidence to show that the contingency had occurred which made effective the aforesaid provision of the policy.

APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, seventh district, rendered after the trial before the court without a jury.

Woodford, Bovee & Butcher (James N. Luttrell, of counsel), for appellant.

Joseph M. Edelson (Bertram L. Marks, of counsel), for respondent.

LEHMAN, J. The plaintiff has recovered a judgment upon a policy of insurance in the sum of $500 issued by the defendant upon the life of Isaac Levitt. The policy contains a clause that "if the age of the Insured has been misstated the amount payable hereunder shall be such as the premium paid would have purchased at the correct age." The policy also contains on its face the words "Ordinary Life Intermediate Class. *Age 60.* Amount $500. 1/12 Annual Premium $3.13." It appeared at the trial practically without dispute that the insured was sixty-six years old at the time the policy was issued; that in his application his age was stated as sixty; that the premium paid would have purchased a policy for only $370.85 if the age had been correctly stated. The defendant admits liability for, and has paid into court, this amount less the unpaid premium for the last year. The trial justice has given

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judgment for the face amount of the policy less the unpaid premium, apparently on the ground that the application was not attached to the policy and that under section 58 of the Insurance Law the application did not become part of the policy of insurance unless attached thereto.

The policy recites that it is issued " In consideration of the application for this policy, copy of which application is attached hereto and made part hereof." It also provides that " this policy and the application therefor constitutes the entire contract between the parties. * * * All statements made by the insured shall, in the absence of fraud be deemed representations and not warranties and no such statement shall avoid this policy or be used in defense of a claim hereunder unless it is contained in the written application therefor and a copy of such application is securely attached to this Policy when issued." These clauses of the contract must be read in connection with section 58 of the Insurance Law and are, I think, practically a stipulation by the parties fixing their rights in the same manner as in any event and without express stipulation they would be fixed by law. I do not think, however, that they can be given the effect contended for by the plaintiff and that they prevent the court from considering the statement of the insured as to his age though the application was not physically attached to their policy.

There can be no doubt that the insured did make a misstatement as to his age and there can be no doubt that the amount of the policy was determined upon that statement. The parties have expressly stipulated however, that in spite of the fact that the policy states on its face that it is for $500, yet if the age of the insured has been misstated, the amount payable shall be such as the premium would have purchased at the

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correct age. Unless this clause can be enforced the insured will receive more insurance for the premium than the parties agreed upon and more than the parties could have agreed upon without contravention of section 89 of the Insurance Law. I cannot see any valid reason why the contract should not be enforced in accordance with the intent of the parties. To do so would not, as the plaintiff claims, make the application a part of the contract nor permit a statement therein to be used as a defense of a claim thereunder though not attached to the contract. The contract on its face shows that the amount payable thereunder is based upon the assumption that the insured was sixty years of age when it was issued and it further provides that if the age has been misstated the amount payable shall be such as the premium paid would have purchased at the correct age. The defendant does not now seek to interpose any representation in the application as a defense to the claim under the contract nor does it seek to incorporate the application into the contract. It stands upon the actual contract itself and the application is material and competent evidence to show that the contingency has occurred which makes effective the clause that the amount payable shall be such as the premium would have purchased at the correct age. In other words, as I read the contract, it expressly provides for a payment of $500 upon the death of the insured based upon the assumption that the age of the insured is sixty, or a payment of the amount which the premium would purchase if the age has been misstated. That contract represents the whole agreement of the parties and there is nothing either in the express contract or in the statute which precludes the defendant from showing by proof outside of the contract that the contingency agreed upon has occurred. It follows that the judgment should be reduced to the sum of

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$344.87 with appropriate costs in the court below, and as modified, affirmed, with twenty-five dollars costs to the appellant.

PENDLETON and WHITAKER, JJ., concur.

Judgment modified, and, as so modified, affirmed, with twenty-five dollars costs to appellant.

ROY F. MITCHELL, Respondent, *v.* HEINRICH AEROPLANE COMPANY, INC., Appellant.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Contracts — breach of — evidence — application for aviator's certificate.

The evidence in an action for breach of contract, containing no time limit, by which defendant agreed to furnish a machine and a competent teacher to give plaintiff lessons in the art of flying until he was competent to make application for an aviator's certificate, considered, and held, reversing a judgment in favor of plaintiff for failure of proof, that for all that appeared in the record defendant was and ever since plaintiff took his twenty-fifth and last lesson has been ready to give him lessons at any time he might within reason apply therefor.

APPEAL by the defendant from a judgment rendered in the Municipal Court of the city of New York, borough of Manhattan, first district, in favor of the plaintiff.

Reed, Gwinn & Deming (Charles Hobby Bassford, of counsel), for appellant.

Weil, La Guardia & Espen (Jesse Weil, of counsel), for respondent.

WHITAKER, J. The plaintiff and the defendant on October 24, 1914, entered into a written agreement by

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the terms of which plaintiff agreed to pay the sum of $300, and the defendant agreed " to furnish a machine and competent instructor to instruct the pupil in the art of practical flying at our Aviation field at the Hempstead Plains, Aviation Grounds, Garden City, L. I., until the pupil is competent to comply with the rules of the International Aeronautical Federation for an Aviator's certificate." The plaintiff paid the $300 and began taking lessons under an instructor furnished by defendant. The lessons were discontinued for the winter in December, 1914, and resumed in June, 1915. The plaintiff took about twenty-five lessons in all, the last one, as he testifies, being on July 29, 1915. Plaintiff claims that about this time the machine, upon which he had been receiving instruction, was wrecked and that thereafter he received no more lessons. The contract contained no time limit and defendant was obligated thereby to give plaintiff a sufficient number of lessons until plaintiff became competent, etc. Neither was the plaintiff limited in time in which to receive the lessons so that the question is whether or not the defendant refused to perform on its part within a reasonable time after demand therefor made by the plaintiff. The court below found that " the defendant has delayed an unreasonable time in the performance of its contract " and gave judgment in favor of the plaintiff for the amount paid by him to defendant for instruction, and in addition thereto plaintiff's expenses from Seattle, Wash., his place of residence, to Garden City. Clearly there is no foundation for the allowance of this last item. There is no claim that plaintiff was induced to seek the defendant's school by any false representations, and payment of plaintiff's traveling expenses from his residence to defendant's school is not a proper element of damages for a breach of its contract. I am also of the opinion that the plaintiff

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failed to prove any breach of contract on the part of defendant. It appears that the plaintiff in December voluntarily ceased taking lessons and worked in defendant's factory at wages, until he again resumed lessons in June, 1915. He admits that after he took his last lesson on July 29, 1915, although the particular machine upon which he had been taking lessons, called by him the "school machine," was broken, the defendant had another machine running "in fine shape" but that he never asked for a lesson to be given him on that machine and was never told that he could receive lessons thereon. His reason being that "I did not want lessons on that machine." He also testified that although he was frequently at the field where lessons were given he did not make himself known to any person there or ask for lessons. On November 22, 1915, plaintiff was notified by letter from defendant that he, plaintiff, had received twenty-seven lessons and that he was entitled to thirty-three more and that the defendant was ready to give those "at any time weather conditions permitting." Plaintiff says he visited defendant's school several times after the receipt of this letter and says that they had no machine there. This evidently refers to what he termed the "school machine," as it is not disputed that the defendant had a high power machine there, and, as before stated, plaintiff did not ask for nor was instruction refused him upon that machine. For all that now appears in the record the defendant was, and has been ready ever since July 29, 1915, to give plaintiff lessons at any time he might within reason apply.

GUY and COHALAN, JJ., concur.

Judgment reversed, new trial ordered, with thirty dollars costs to appellant to abide event.

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S. L. SNYDER CO., INC., Appellant, v. MILTON ABRAMS, Respondent.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Appeal — when dismissal of complaint reversible error — in action to recover for work, labor and services.
Waiver — Municipal Court Code, § 88.

In an action to recover for work, labor and services under a contract made with defendant who did not disclose that he was a member of a partnership and of which fact plaintiff was not aware until the trial, a dismissal of the complaint is reversible error.

In a Municipal Court action on a partnership liability the right of a defendant to have his partners joined as defendants is waived unless taken by motion under section 88 of the Municipal Court Code.

APPEAL by the plaintiff from a judgment of the Municipal Court of the city of New York, borough of Manhattan, third district, in favor of the defendant, dismissing the complaint and from an order denying plaintiff's motion to vacate said judgment and for a new trial.

Louis Rosenberg, for appellant.

Respondent filing no briefs.

WHITAKER, J. Plaintiff sued to recover for work, labor and services performed by plaintiff's assignor for the defendant.

The undisputed testimony shows that plaintiff's assignor made the contract to perform the services, if one was made, with the defendant alone, who did not disclose at the time that he was a member of a copart-

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nership, and that plaintiff was not aware of that fact until the time of the trial. When it so appeared the trial justice dismissed the complaint upon the merits. This was error. It is not sufficient to relieve a party who makes a contract from individual liability, and to shift the liability upon a firm, unless the proof shows the existence of such firm at the time of the making of the contract, and knowledge thereof on the part of the plaintiff. The contract in this case was made with the defendant individually without knowledge of the existence of the copartnership of which the defendant claimed to be a member.

Moreover section 27, subdivision 2, of the Municipal Court Code provides that: "No action shall be defeated by the non-joinder or misjoinder of parties. The names of new parties may be added and the names of parties misjoined may be struck out, by order of the court, at any stage of the cause and upon such terms as justice may require." It has also been held that the right of a defendant to have partners joined upon a partnership liability is waived unless taken by answer or demurrer (*Alaska Banking & Safe Deposit Co.* v. *Van Wyck,* 146 App. Div. 5), now by motion under section 88 of the Municipal Court Code.

GUY and COHALAN, JJ., concur.

Judgment reversed, and new trial ordered, with thirty dollars costs to appellant to abide event.

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FERDINAND L. CABELLO, Respondent, *v.* JOSEPH L. HARBURGER, Impleaded with PAUL CORN et al., Appellants.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Actions — jurisdiction of Municipal Court of city of New York — contracts — waiver of conversion of chattels.

The Municipal Court of the city of New York has no jurisdiction of an action to recover $750 damages for the conversion of motion picture films sold to defendant under a contract of conditional sale.

A contention that as under the contract, in default of any payments, plaintiff might elect to consider the agreement void there was no longer any conditional contract of sale and the action was not founded thereon was untenable, as if there had been no contract plaintiff would have had no cause of action.

While a plaintiff may waive the conversion of chattels sold to defendant under a contract of conditional sale and sue in assumpsit for their value, the foundation of the action would be in contract.

APPEAL by the defendant Joseph L. Harburger from a judgment of the Municipal Court of the city of New York, borough of Manhattan, fifth district, in favor of the plaintiff, which judgment provided that the defendant is liable to arrest and imprisonment.

Steiner & Petersen (Jerome Steiner and Joseph H. Kohan, of counsel), for appellant Harburger.

Harry E. Herman, for respondent.

WHITAKER, J. The action was brought against the defendants to recover the sum of $750 for the conversion by the defendant Harburger of motion picture films. The complaint alleged that the plaintiff was the owner of the property in question; that on or

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about the 1st day of September, 1915, the plaintiff let and sold to said defendant Harburger, by agreement in writing, the property in question, at certain rentals. These rentals were to be paid in advance in instalments, and in default of the payment of any one of the instalments all defendants' rights thereunder should cease and plaintiff should be immediately entitled to the possession of the property; should defendant pay the instalments the property was to belong to defendant; that the plaintiff delivered the property to defendant pursuant to such agreement; that defendant Harburger failed to pay various instalments, and that by reason thereof plaintiff elected to terminate the agreement and has become entitled to a return of the property and the possession thereof; that plaintiff demanded the return of the property and defendant Harburger refused to return the same; that after the execution of the contract the other defendants became possessed of such property with the knowledge of the contract between plaintiff and Harburger and with knowledge of the default of Harburger to make the payments required by the contract; that plaintiff also demanded the other defendants to return the property and they refused " and wrongfully and fraudulently removed and secreted said chattels from plaintiff and converted them to their own use." Plaintiff demands judgment against defendants for the sum of $750.

The defendant Harburger appeared and interposed an answer admitting the contract, but denying all other allegations.

The action was tried and resulted in a judgment for plaintiff from which defendant Harburger appeals to this court.

There are only two errors alleged by the defendant. *First,* that the court had no jurisdiction of the action. *Second,* that the court erred in not allowing the defend-

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ant Harburger to introduce evidence that defendants had subrented the films. An examination of the agreement shows that it was a conditional sale, the instalment payments being denominated rentals.

The Municipal Court derives its powers exclusively from statute. Section 6 of the Municipal Court Code prescribes its general jurisdiction, and provides that it shall have jurisdiction in " an action to recover a chattel or chattels, the aggregate value of which does not exceed one thousand dollars, with or without damages for the taking or detention thereof." This provision is general in its scope.

The general grant of jurisdiction is subsequently qualified by section 73, which provides as follows: " No action of conversion or replevin arising on an instrument mentioned in section 70 shall be maintained against the conditional vendee, lessee or mortgagor."

In section 70 " a contract of conditional sale of personal property " is specifically mentioned.

Reading these sections together, they are not inconsistent. Subdivision 2 of section 6 is general in its scope, and refers to actions where the defendant has property in his possession belonging to the plaintiff, without specifying the manner in which the defendant acquired such possession. Under that general provision, standing alone, the Municipal Court would, I think, have jurisdiction of an action for conversion. Section 73, however, has excepted from that general provision actions for conversion where the possession has been acquired under " a conditional sale." It will be observed that section 73 also prohibits an action of " replevin " where the right arises under a conditional sale. Still sections 57 and 58 grant full jurisdiction in replevin actions. It is apparent, therefore, that the statute has expressly provided that the Municipal Court shall not have jurisdiction in actions for con-

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version founded on conditional sales. And it is also apparent, from all the legislation upon the subject, prior to the new Municipal Court Code, that it has been the general policy of the legislature to deny to the Municipal Court jurisdiction of actions or proceedings arising from conditional sales of personal property. Before the passage of the new Municipal Court Code, the question was fully settled by judicial authority, and I do not think there has been any change in this practice since the new Municipal Court Code went into effect.

I presume the object of prohibiting such actions in the Municipal Court was for the protection of ignorant and poor people.

The respondent makes the point that inasmuch as the contract provides that " in case of default in any of said payments said Fred L. Cabello may elect to consider this agreement void," the respondent could have and has declared the contract void, and therefore there is no longer any " conditional contract of sale " and the action is not founded on such a contract.

This position of the respondent is, I think, untenable. If there had been no contract the plaintiff would have had no cause of action. It was the contract which gave plaintiff his right of action, and the contract is " a conditional sale " and all of plaintiff's rights arose therefrom and are based thereon. The defendant's possession of the property is founded on the contract of conditional sale.

That the action is one for conversion, I do not think can be denied. The facts alleged in the complaint constitute an action for conversion. It is true that in the plaintiff's prayer for relief he does not ask for a return of the property or a judgment for its value but only a judgment for a specific sum, but the prayer for relief does not change the nature of an action at law,

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and as matter of fact the form of the judgment and the record indicate that the action was tried and determined as one for conversion, although plaintiff's counsel avoided making a definite declaration, and the court made no direct ruling upon the question. While it is true that under the law as it now stands in this state the plaintiff could have waived the tort of conversion and sued on assumpsit (*Terry* v. *Munger*, 121 N. Y. 161), still the foundation for the action would be the original agreement of conditional sale. The fact that the judgment entered in the case provides for a body execution is conclusive as indicating that the court determined finally, although it refused to so unqualifiedly declare upon the trial, that the action was as matter of fact conversion, and that the plaintiff did not waive the tort and sue on assumpsit.

PENDLETON, J., concurs; LEHMAN, J., concurring in he result.

Judgment should be reversed, with thirty dollars costs, and the complaint dismissed, with costs.

ANNIE MAUDE MILLS, Respondent, *v.* HARRY MILLS, Appellant.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Alimony — action to recover arrears of — divorce — actions — motions and orders — evidence — when law of state of New York governs. Contempt — disobedience of orders made by courts of sister states.

Where in an action to recover arrears of alimony alleged to be due under an order of a court of Illinois there is no evidence as to the law of that state upon the question in litigation, the law of the state of New York governs.

Where the decree which finally determined, in favor of the husband, cross actions for divorce brought in the state of Illinois,

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made no provision for alimony, the life of an order for alimony *pendente lite* ended at the same time, and under the laws of the state of New York proceedings to enforce payment of temporary alimony must be taken in the action in which the order therefor was granted.

Our courts will not punish as for contempt disobedience of the orders made by the courts of sister states.

APPEAL from a judgment of the Municipal Court of the city of New York, borough of Manhattan, fifth district, entered in favor of plaintiff on January 25, 1916, for the sum of $316.31 after trial before the court without a jury.

John R. Jones, for appellant.

Oscar A. Campbell, for respondent.

WHITAKER, J. The judgment appealed from was rendered in an action brought to recover arrears of alimony alleged to have been due upon an order of the Circuit Court of Cook county, state of Illinois, dated April 19, 1911, which directed the defendant herein to pay to plaintiff the sum of seven dollars a week *pendente lite* and twenty-five dollars counsel fee in an action then pending between the plaintiff and her husband, the defendant, for an absolute divorce. The defendant in that and in this action, Harry Mills, also instituted an action against this plaintiff in the same court and state for an absolute divorce so that there were cross actions. On the 8th day of November, 1911, both these actions came on for trial and after a trial before the court a judgment was duly rendered and entered after such trial in favor of Harry Mills, the plaintiff in that action and defendant in this action; and a final judgment and decree entered which finally determined both actions in the Illinois court in favor of the plaintiff there, Harry Mills, who is the defendant herein. There

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was no provision made in the decree for alimony. Upon the trial of this action the plaintiff introduced in evidence the order awarding temporary alimony duly authenticated; evidence tending to show that it had not been paid and that there were about two hundred and three dollars due and rested.

The defendant after moving to dismiss and for judgment on the merits and the motions being denied offered in evidence the final judgment and decree between the parties for an absolute divorce and also a stipulation in the case of *Harry Mills* v. *Annie Maude Mills,* wherein it was stipulated that the order awarding alimony upon which this action is brought "be released and satisfied." This stipulation was not signed by the parties themselves but by their respective attorneys. This constituted the defendant's case.

The defendant asks for a reversal of the judgment entered in favor of plaintiff upon the following grounds: *First,* that the order directing the payment of alimony *pendente lite* cannot form the basis of an independent action; *second,* that the court had no jurisdiction of the subject of the action; *third,* that the stipulation received in evidence was an effectual bar to the action.

I think the first ground urged by the appellant is sufficient to dispose of the case. There is no evidence in the case as to what the law of Illinois is upon the questions in litigation. We are governed, therefore, by the law as it is in this state. The order awarding alimony expressly provides that the alimony "is temporary alimony during the pendency of this cause." The evidence shows that the cause in which it was granted is no longer pending; that it has been finally determined and ended and of course the life of the order for alimony *pendente lite* ended at the same time, and under the law of this state proceedings to enforce pay-

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ment of temporary alimony must be taken in the action in which the order for alimony was granted, that is, during the pendency of the action and the life of the order. And if there is no action pending, no proceeding may be taken thereon. *Matter of Thrall,* 12 App. Div. 235, affd., 153 N. Y. 644; *Hayes* v. *Hayes,* 150 App. Div. 842. The defendant cites the case of *Jacobson* v. *Jacobson,* 85 Misc. Rep. 253, as decisive upon the question, wherein Mr. Justice Finelite in a very well considered and concise opinion follows the Appellate Division in holding that the remedy for disobedience of an order to pay temporary alimony is exclusive and is governed by sections 1771 and 1772 of the Code of Civil Procedure, consequently no action may be brought upon such an order. That is correct in so far as an order of a court of this state is concerned. I do not thnk Judge Finelite's opinion applies to orders of the courts of other states, however. The order under consideration is an order of a court of Illinois and our courts will not punish for contempt disobedience of orders of courts of other states.

It is unnecessary to consider the other points raised by the appellant except to state that we think the Municipal Court under the new Municipal Court Code has jurisdiction of an action upon a foreign judgment of a court of record.

The judgment should be reversed, with thirty dollars costs, and the complaint dismissed, with costs.

PENDLETON, J., concurs; LEHMAN, J., concurs in the result.

Judgment reversed, with thirty dollars costs.

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THE ROSENTHAL PAPER COMPANY, Appellant, *v.* THE NATIONAL FOLDING BOX AND PAPER COMPANY, Respondent.*

(Supreme Court, Appellate Term, First Department, May, 1916.)

Patents — assignment of — granting of exclusive license — when liable to assignee for agreed royalty.

Where the owner of a patent, after granting to defendant an exclusive license to make and sell articles manufactured thereunder, assigns the patent but the licensee enjoys the benefits of his contract without molestation of any kind for its full term, he is liable for the agreed royalty to the assignee of the patent.

APPEAL by the plaintiff from an order and judgment of the City Court of the city of New York, setting aside a verdict of the jury rendered in his favor dismissing the complaint.

Joseph A. Arnold, for appellant.

Walter D. Edmonds (Franklin M. Clark, of counsel), for respondent.

WHITAKER, J. The action was brought to recover royalties due under a written contract made March 1, 1909, between the plaintiff's assignor, Isse Seligstein, and the defendant, The National Folding Box and Paper Company. The contract granted to the defendant an exclusive license to make and sell folding boxes in certain New England and middle states for a period of five years from March 1, 1909, under letters patent No. 906,138, issued December 8, 1908. The defendant agreed to pay for such privilege stipulated royalties which, however, were to be not less than $500 a year.

* See 91 Misc. Rep. 405.— [REPR.

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The plaintiff's assignor was the owner but not the inventor of the patent.

The amended answer contains seven defenses and four counterclaims. The first counterclaim corresponds to the first defense, and alleges a breach of an independent covenant in the contract to protect the patent against substantial infringements. The second counterclaim corresponds to the second defense. No evidence was introduced thereunder. The same is true of the third counterclaim and third defense, which relate to the same subject matter. The fourth defense alleges a modification of the contract. That issue was decided in the appellant's favor by the verdict of the jury under appropriate instructions. The fifth defense, which corresponds to the fourth counterclaim, sets up in another form a breach of the covenant above referred to. The sixth defense raised the question of the plaintiff's right to sue. The seventh defense took issue upon the fact of assignment.

At the close of the plaintiff's case the defendant moved to dismiss the complaint on the grounds that the contract was not assignable, and that by assigning the patent Seligstein put it out of his power to perform his covenant to protect the patent against infringements. The trial court denied the motion at that time.

At the end of the whole case the defendant renewed its motion to dismiss the complaint on the same grounds urged at the close of the plaintiff's case. The court again denied the motion and also denied the defendant's motion to direct a verdict in its favor.

The jury found a verdict for the plaintiff-appellant for $1,840.73, the difference between five years' minimum royalty of $500 a year, with interest, and the amounts paid by the defendant from time to time under the contract.

At the conclusion of the trial the defendant made

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the usual motion to set aside the verdict and also to dismiss the complaint. The court stated that it had no disposition to consider the motion upon the facts, but would take it under advisement upon questions of law. Thereafter the court set aside the verdict and dismissed the complaint "solely upon the ground that Seligstein violated the contract of license by assigning the patent."

The verdict of the jury under the very fair and clear charge of the court, we think, settled the following facts:

The plaintiff's assignor, Isse Seligstein, and defendant entered into the following contract:

"MEMORANDA OF AGREEMENT between Isse Seligstein of St. Louis, Missouri, and The National Folding Box & Paper Company, a corporation, organized under the laws of the State of New Jersey, and having its principal office and place of business at New Haven, Connecticut.

"WHEREAS, said Seligstein is the sole owner of Letters Patent 906,138, issued December 8, 1908, in the name of Frank H. Houghland of St. Louis, Missouri, Assignor, for a patent folding clothing millinery or suit box, or any box for any purpose made under the claims of said patent — the boxes manufactured under said patent being known by the trade name of 'The Lightning' box, and

"WHEREAS, the said The National Folding Box & Paper Company is desirous of acquiring the exclusive right to manufacture and sell the said the 'The Lightning' box within the border lines of the following States of the United States of America: Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, New Jersey, Delaware, Maryland and the District of Columbia.

"*Now Therefore,* it is mutually agreed between the

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said Seligstein and the National Folding Box & Paper Company that the said Seligstein hereby sells to said The National Folding Box & Paper Company the exclusive right to manufacture and sell boxes under said patent, including any improvements made thereon within the territory above described, upon the following terms and conditions:

"1. The National Folding Box & Paper Company agrees to pay the said Seligstein a royalty of One Dollar ($1.00) per thousand boxes up to an average daily sale of Twenty (20) thousand boxes per day, per year of 300 days, and on all boxes sold in excess of said twenty (20) thousand boxes per day, per year of 300 days, the said The National Folding Box & Paper Company agrees to pay a royalty of seventy-five cents (75c.) per thousand boxes, but it is expressly understood that the payment by the said The National Folding Box & Paper Company to said Seligstein for the right to manufacture and sell boxes under said Letters Patent shall not be less than the sum of Five Hundred Dollars ($500.00) for each and every year during the life of this contract.

"2. The said Seligstein promises and agrees that he will faithfully protect said Letters Patent from any and all substantial infringements of said Letters Patent.

"3. The said Seligstein further agrees that during the life of this contract he will not sell within the territory, above described, any box manufactured under said Letters Patent, #906,138, nor any other clothing, millinery or suit box, and further that he will not during the life of this contract sell any rights for any clothing, millinery or suit box to any one for the territory heretofore described.

"4. The terms of this contract shall be five (5) years from and after the first day of March, A. D. 1909, with

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the right on the part of said The National Folding Box & Paper Company to extend this contract upon the same terms and conditions for a further term of five (5) years thereafter, and at the expiration of the second five year term, the said The National Folding Box & Paper Company shall then have the right and option to further extend this contract on the same terms and conditions for the full life of the patent, it being understood that at each renewal period the said The National Folding Box & Paper Company shall give to the said Seligstein at least sixty (60) days notice of its intention to renew and continue said contract."

The defendant continued to use the exclusive right to make and sell the boxes for the full term of the contract and paid the royalties therein provided for, which were less than $500 a year. The verdict of the jury was for the difference. There were no substantial infringements of the patent and no violation of the express terms of the contract. And the court has held that the assignment of the letters patent by Seligstein to the plaintiff, as between themselves, was valid, in which we fully concur. The court bases its decision and opinion that plaintiff cannot recover "solely upon the ground that Seligstein violated the contract of license by assigning the patent" to plaintiff. The court expressly states that it does not pass upon the question whether the verdict is against the weight of evidence respecting the alleged infringement of the patent.

The only question to be passed upon, therefore, by this court is: Did the assignment by Seligstein to plaintiff, of itself, breach the contract, and absolve the defendant from liability?

In the first place it has been established that the defendant continued to enjoy the benefits of the con-

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tract without molestation of any kind for its full period of five years; and whether it was a losing contract or a profitable one is immaterial.

We are unable to agree with the opinion of the learned justice of the City Court for the following reasons:

The defendant had full benefit of the contract for its entire period. Seligstein neither expressly repudiated the contract, announced his determination not to perform, nor made performance impossible. *Gray* v. *Green,* 9 Hun, 336; *McIntosh* v. *Miner,* 37 App. Div. 483.

The jury having found that there was no *substantial* infringements, the defendant cannot claim a breach of the contract which has been fully performed by both parties, and all the benefits of which defendant had fully enjoyed. There can be no anticipatory or other breach of a contract which has been fully performed. All the other points raised by the parties are subservient to the question of a breach, and inasmuch as there was no breach they need not be considered.

Order and judgment reversed, with costs, and verdict reinstated, with costs.

LEHMAN and PENDLETON, JJ., concur.

Order reversed, with costs.

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MARIE DUSENBURY, Respondent, *v.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Negligence — presumption of — burden of proof on carrier — what is not appliance for transportation — evidence.

Where personal injury results to a railway passenger from something improper or unsafe in the appliances of transportation, the burden of proof is on the carrier to show that such injury did not result from its negligence.

Property belonging to and taken by a passenger into a railway car is not an appliance for transportation.

The mere fact that a piece of baggage is in the aisle of a car and a passenger stumbles over it does not *per se* raise any presumption of negligence on the part of the carrier.

Where it is as probable that an injury to a railway passenger resulted from the act of a third person as from the negligence of the carrier, the case should not be sent to the jury.

APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, fourth district, entered in favor of the plaintiff for $200 on the 31st day of January, 1916, after a jury trial.

Ellis W. Leavenworth, for appellant.

Bassett, Thompson & Gilpatric (W. H. Gilpatric, of counsel), for respondent.

COHALAN, J. Plaintiff sued to recover damages for personal injuries. It appears that she boarded a passenger train of the defendant at East Orange, N. J., and, in walking up the aisle of the car, tripped over

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a suit case that had been placed between two seats therein. In support of her allegation of negligence, the plaintiff attempted to prove that the defendant's employees knew, or should have known, that the suit case was in the aisle, and should have removed it in time to have prevented the accident.

Plaintiff's testimony and that of one Fisher was, that as soon as the passenger train stopped at the station in East Orange she was the first passenger to go up the steps of the car, and enter that particular end of it; that no brakeman was standing at the car steps, by which she had entered; and that after she had gone a few feet she stumbled over a large suit case, which almost filled the aisle of the car. As against the plaintiff's proof, the defendant showed by two witnesses that the plaintiff went up the steps of the car preceded by a man or boy with a suit case, and followed by the owner thereof. The defendant further proved by the positive testimony of the witness Otis that the suit case was brought into the car at the same station at which the plaintiff got on, and that it was placed in the seat occupied by the witness, and left there with the end protruding about six inches into the aisle. This would indicate that the suit case was placed in the aisle without the knowledge of the defendant's employees, and immediately prior to the accident. Where an injury results from something improper or unsafe in the appliances of transportation, the burden is on the carrier to prove that such injury did not result from its negligence. Property belonging to, and taken by a passenger into, a car is not such an appliance. The mere fact that a piece of baggage is in the aisle and a passenger stumbles over it, does not *per se* raise any presumption of negligence on the part of the railroad company. *Burns* v. *Pennsylvania R. R. Co.*, 233 Penn. 304; *Van Winkle* v. *Brook-*

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lyn City R. R. Co., 46 Hun, 564; *Millie* v. *Manhattan R. Co.*, 5 Misc. Rep. 301. Where it is as probable that the injury resulted from the act of a third party, as from the negligence of the defendant, the case should not be submitted to the jury. There was an absence of proof of knowledge on the part of the defendant. The plaintiff was unable to adduce any proof with respect to the length of time that the suit case had been in the aisle, and the testimony of the witness, Fisher, does not aid her in this regard.

GUY and WHITAKER, JJ., concur.

Judgment reversed, new trial granted, with thirty dollars costs to appellant to abide event.

STUARD HIRSCHMAN, Respondent, *v.* EDWARD J. KUECHLE, Appellant.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Landlord and tenant — actual partial eviction not shown.
Services — performance of — implied promise to pay for services.
New trial — when granted — in action for rent — motions and orders.

Where in an action for rent the undisputed evidence showed that the storage by plaintiff on the premises of certain articles was with the consent of defendant who furnished a key to the building on request, none of the elements of an actual partial eviction are shown.

In the circumstances there was an implied promise that plaintiff would pay for the use of the part of the building occupied by him.

Where one performs services for another with his knowledge and consent by reason of which the other is benefited there is an implied promise to pay therefor.

Where in an action for rent it was claimed that plaintiff's occupancy of a portion of the leased premises constituted an

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actual partial eviction and that defendant was entitled to an affirmative judgment for breach of covenant for quiet enjoyment or for use and occupation, the question of the fair and reasonable value of such use is for the jury, and where on motion to dismiss such defense and counterclaim made at the close of plaintiff's case defendant asks to go to the jury "upon the facts and upon the issues in the case," the granting of the motion to dismiss and denial of plaintiff's motion is error for which a new trial must be granted upon which the only issue to be tried is the value of the use of that portion of the premises occupied by plaintiff.

WHITAKER, J., dissents.

APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, fifth district, rendered in favor of the plaintiff.

Raphael Link (Charles E. Hughes, Jr., of counsel), for appellant.

Gilbert, Lauterstein & Gilbert (Francis Gilbert, of counsel), for respondent.

COHALAN, J. The plaintiff herein leased to the defendant a building and a basement therein from month to month at an agreed rental of fifty-five dollars per month. He brought this action to recover for eighteen months' rent from July 1, 1914, to January 1, 1916.

Defendant admitted the nonpayment of the rent for the time claimed, but pleaded two defenses and counterclaims, one of which he abandoned at the trial. The defense and counterclaim tried, was that the defendant claimed that the plaintiff had since December, 1911, used a portion of the demised premises for the storage of an automobile body and seven small boxes or drawers taken out of a desk or bureau. This storage was not disputed by the plaintiff. The automobile body was changed each fall and spring, one body being a

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limousine and one an open body, and the change made as the seasons required. The defendant claims that this occupancy constituted an actual partial eviction by the plaintiff of a portion of the demised premises, and thereby suspended the payment of the rent during the time of such occupancy, and also that the defendant was entitled to recover an affirmative judgment for a breach of the covenant for quiet enjoyment or for the use and occupation of that portion of the demised premises occupied by plaintiff.

The testimony was taken before a jury, the defendant assuming the burden of sustaining his defense and counterclaim. At the close of the case, the plaintiff moved to dismiss this defense and counterclaim, and the defendant asked leave to go to the jury "upon the facts and upon the issues in the case." He made no statement however as to what he claimed to be the issues in the case. Plaintiff's motion was granted and the defendant's motion was denied. Judgment was thereupon rendered in favor of plaintiff for the entire amount of his claim, but whether by the jury upon direction of the court does not appear. The evidence is undisputed that the storage of the articles by the plaintiff during the whole time they were in the demised premises was with the knowledge and consent of the defendant, and that he acquiesced therein without any objection. He frequently and always when asked to do so furnished the key of the building to the plaintiff or to his employees to enable them to enter whenever they wished to change the car body or for other purposes. None of the elements of an actual partial eviction of any portion of the demised premises was shown, and there was no evidence that the plaintiff ever wrongfully or unlawfully entered the premises or attempted to exercise any rights to any portion of the premises in hos-

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tility to those of the defendant. When the plaintiff moved to dismiss the defense and counterclaim of the defendant the situation was this: The defendant had admitted his liability for the rent claimed by plaintiff. He had proven without objection or dispute that the plaintiff had used a portion of the leased premises with defendant's knowledge and consent, or at least without objection. He had not shown any express agreement or promise to pay for the use of that portion so used by him, but under the circumstances there was an implied promise to make such payment.

If one performs services for another with his knowledge and consent by reason of which the other is benefited there is an implied promise of payment therefor. *Sheldon* v. *Sherman*, 42 Barb. 368. The defendant testified that the use of the portion of the premises used by plaintiff was worth from twenty to twenty-five dollars per month, but no proof as to the value of such use was offered by the plaintiff. What was the fair and reasonable value of the use of that portion of the demised premises occupied by the plaintiff should have been submitted to the jury for their determination. For this reason there must be a new trial and upon such new trial the only issue to be tried is that of the fair and reasonable value of the use of that portion of the leased premises used by the plaintig and for the time it was so occupied.

Judgment reversed, new trial ordered, with thirty dollars costs to appellant to abide the event, and upon such new trial the only issue to be tried is the value of the use of that portion of the premises occupied by the plaintiff. Municipal Ct. Code, § 129, subd. 5.

GUY, J., concurs; WHITAKER, J., dissents.

Judgment reversed, new trial ordered, with costs to appellant to abide event.

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BENJAMIN J. CONROY, Appellant, v. WILLIAM M. BARRETT, as President of the Adams Express Company, Respondent.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Sales — delivery — in whom title remains — appeal — Personal Property Law, § 100.

Upon the sale of a diamond ring a stipulation by the seller to deliver it to the buyer at a particular place is an essential part of the transaction, and under rule 5 of section 100 of the Personal Property Law (Laws of 1911, chap. 579) the title to the ring remains in the seller until delivery is made as agreed.

Plaintiff's assignor bought a diamond ring in defendant's store and it was agreed between the buyer and the salesman that the ring should be delivered to the buyer at a particular place, but when the sealed box in which the ring had been securely wrapped was opened at the place of delivery the ring was missing. In an action by the assignee of the buyer, held, that until delivered as agreed the title to the ring remained in the seller, and a dismissal of the complaint on the ground that the title to the property was in the buyer will be reversed.

APPEAL from a judgment entered in the Municipal Court of the city of New York, borough of Manhattan, fifth district, dismissing the plaintiff's complaint in a trial before the court and a jury.

Grout & McKinney (F. Sidney Williams, of counsel), for appellant.

Edward V. Conwell, for respondent.

COHALAN, J. This action was brought by the plaintiff, as an assignee, to recover the sum of fifty-five dollars for the loss of a diamond ring.

It appears that on March 28, 1914, Alice J. Burns

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purchased a diamond ring in the store of Abraham & Strauss, in the borough of Brooklyn. She gave her address as Greenwich, Conn., Rural Delivery 26. It was agreed between her and the salesman in the diamond department that the vendors would deliver the ring to her in Greenwich.

The ring was sealed in a small box, the same was securely wrapped, and after passing through several hands was delivered to the agent of the Adams Express Company. His receipt in evidence showed that a valuation of fifty-five dollars was placed upon the article.

On March 31, 1914, the package was delivered to the consignee by the Adams Express Company in Greenwich, and when opened the ring was missing.

At the conclusion of the plaintiff's case, the court dismissed the complaint on the ground that the title to the property was in the consignee, and the plaintiff was without power to institute the action. It is a fair inference to be drawn from the memorandum of the sale, the receipt of the Adams Express Company — showing that the delivery charges were paid by the consignors — and from the testimony of the sales agent that the agreement provided for a delivery and the transaction was not completed until the ring was delivered to the consignee at the designated address. If this be so, the plaintiff has brought himself within rule 5 of section 100 of the Personal Property Law (Laws of 1911, chap. 579). The section and rule in part read:

"Section 100. Rules for ascertaining intention. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer * * *.

"Rule 5. If the contract to sell requires the seller

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to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

The contract not only required the sellers to deliver the goods to the buyer, but it also required the sellers to deliver the article at a particular place. The sellers having agreed to make the delivery, they were bound to see that that delivery was properly made, and the title to the article remained in them until the agreement of sale and delivery had been completed.

If the vendee, instead of stipulating at the time of the sale that the ring was to be delivered to her in Greenwich, had said nothing about such a delivery, but at some subsequent time authorized the vendors to send it to her by carrier, then the provisions of section 127 of the Personal Property Law might be applicable to the situation. *Schanz* v. *Bramwell,* 143 N. Y. Supp. 1057. But in this case a stipulation of delivery was made at the time of the sale, and the agreement to deliver was an essential part of the transaction.

On the whole case, the plaintiff was entitled to the most favorable inferences to be drawn from the evidence, and it was error on the part of the court to dismiss the complaint.

GUY and WHITAKER, JJ., concur.

Judgment reversed, new trial ordered, with thirty dollars costs to appellant to abide event.

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SAMUEL B. DOBBS, Respondent, v. PRUDDEN-WINSLOW COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Accord and satisfaction — what completes an — delivery unsatisfactory.

On the delivery of brick ordered by defendant from plaintiff by sample they proved to be unsatisfactory. Defendant notified plaintiff that the expenses of a proper adjustment of the mistake would be deducted from the amount of his bill and mailed him a letter enclosing a check for the difference. Plaintiff answered that he would receive the check only on account, whereupon defendant replied that he tendered the check only in full settlement and that if plaintiff did not see fit to accept the check to return it. Held, that as it was clear that some expense had been incurred and that there was a *bona fide* dispute in regard to the shipment of the brick the deposit by plaintiff of the check and the use of its proceeds completed an accord and satisfaction.

APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, fifth district, rendered in favor of plaintiff, and from an order denying defendant's motion for a new trial. The case was tried by the court without a jury.

Zabriskie, Murray, Sage & Kerr (Charles L. Cole, of counsel), for appellant.

Albert Woodin Gray (James P. Callender, of counsel), for respondent.

COHALAN, J. On December 3, 1914, the defendant ordered bricks from the plaintiff to be used in Greenwich, Conn. These bricks were to conform to sample. When the bricks were delivered they proved to be unsatisfactory. At a conference held thereafter by the representatives of the parties to the action, there

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was a discussion as to whether or not the bricks should be culled, and that the expenses therefor and other expenses incidental to the proper adjustment of the mistake should be borne by the plaintiff; all with the approval of the architect of the building in process of construction.

It is clear that some expenses were incurred, and that there was a dispute in regard to the shipment. After the matter had been finally closed and the plaintiff had requested payment for the order of December 3, 1914, which was shipped on April 16, 1915, the defendant wrote a letter to the plaintiff inclosing a check for $152.09. This letter stated that the check was in full settlement, after deducting $80.41, the expenses of the adjustment. The plaintiff answered that he would accept the check only on account. Whereupon the defendant replied that the check was tendered in full settlement, and, if the plaintiff did not see fit to accept the same, to return it. The plaintiff did not return the check, but on the contrary deposited the same and used the proceeds.

There was manifestly a *bona fide* dispute as to the amount to which the plaintiff would be entitled upon the delivery of the bricks to fill the order of December 3, 1914. The defendant notified the plaintiff that the expenses of the adjustment would be deducted from the amount of the plaintiff's bill, and the fact that it had so notified the plaintiff shows that the full value of the bricks when delivered was not to be paid by it. The situation, therefore, contained the elements of a dispute within the meaning of the rules governing an accord and satisfaction. *Barron* v. *Brooklyn Heights R. R. Co.*, 150 App. Div. 845; *Ravenswood Paper Mill Co.* v. *Dix*, 61 Misc. Rep. 235; *Waterbury Co.* v. *Maryland Casualty Co.*, 134 N. Y. Supp. 565.

We are of opinion that the sending of the check in

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full settlement and the use of the proceeds thereof by the plaintiff completed an accord and satisfaction. It is immaterial whether or not the creditor sent a receipt on account, or contends that he did not accept the check in full payment of the claim.

GUY and BIJUR, JJ., concur.

Judgment reversed and new trial ordered, with thirty dollars costs to appellant to abide event.

EDWARD JACOBS and HERMAN JACOBS, Copartners, Doing Business Under the Firm Name of JACOBS BROS., Appellants, *v.* RICHARD CARVEL COMPANY, INC., Respondent.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Negligence — who guilty of — evidence — trial — refusal to allow copy of traffic regulations to be taken to jury room.

Where in an action to recover for loss of a horse and repairs to a wagon as the result of a collision at a street intersection in New York city the evidence is to the effect that defendant's motor truck was proceeding on the wrong side of the street and had made the turn at the street intersection before reaching the center of the street, and the jury upon the issue as to whether defendant's motor truck ran into plaintiffs' horse or whether the horse ran into the truck decided in favor of defendant, plaintiffs, upon a claim that defendant's driver did not comply with the city traffic regulations which require that a vehicle turning to the left into another street shall pass to the right of and beyond the center of the street intersection before turning, were entitled to have the jury charged that if they found that the course taken by defendant's driver was the wrong course defendant was guilty of negligence in view of the fact that the court refused to allow a copy of the traffic regulations to be taken to the jury room.

Guy, J., dissents.

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APPEAL from a judgment entered February 23, 1916, in the Municipal Court of the city of New York, borough of The Bronx, second district, in favor of defendant after a trial before the court and a jury.

Frank Krevoruck (J. J. Kramer, of counsel), for appellants.

Giffin & Hannon (Nathan F. Giffin, of counsel), for respondent.

COHALAN, J. Action to recover damages for the loss of a horse and for repairs to a wagon. On February 9, 1915, plaintiff's horse and wagon in charge of a driver were proceeding easterly on One Hundred and Thirty-eighth street in the borough of The Bronx. When the driver reached a point near the intersection of Brook avenue and One Hundred and Thirty-eighth street, there was a collision between the horse and wagon and a motor truck owned by the defendant, which had turned into One Hundred and Thirty-eighth street diagonally in a northwesterly direction. In consequence of the collision the horse received injuries which necessitated its being shot. The left shaft of the wagon was broken and the harness partially destroyed.

The question involved in the action was whether the defendant's truck ran into the plaintiffs' horse, or whether the plaintiffs' horse ran into the defendant's truck, and the issue was decided by the jury in favor of the defendant.

On the trial a certified copy of chapter 24, section 11, of the city traffic regulations was received in evidence. These regulations require that a vehicle turning to the left into another street shall pass to the right of and beyond the center of the street intersection before turning. The evidence in the case was that the

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truck was proceeding northerly on the left or the wrong side of the street, and had made the turn before it had reached the center of One Hundred and Thirty-eighth street. The court had said nothing declaratory of the traffic regulations in evidence, and at the close of the charge this request was made and refused: "I ask the court to charge the jury, that if they find that the course taken by the defendant chauffeur as testified to by him was the wrong course, that the defendant was guilty of negligence, and that the plaintiff is not guilty of negligence contributing thereto, that is, the course taken as specified to by the chauffeur."

While the latter part of this request may not be clear, yet the plaintiffs were entitled to have the first portion thereof stated to the jury. This was important, too, in view of the fact that the court, in its discretion, refused to allow the jury to take the copy of the traffic regulations to the jury room. The course taken by the defendant's chauffeur in driving on the wrong side of Brook avenue and taking a short turn into One Hundred and Thirty-eighth street was an element of importance for the jury to consider as bearing on the defendant's negligence. In fact, this court has already so held in this case. *Jacobs* v. *Carvel Co.*, 156 N. Y. Supp. 766.

It might be that the reckless driving on the part of the driver contributed to the accident, and that that action was sufficient to overcome the mere fact that the chauffeur was violating a city ordinance, but the jury was entitled to an instruction to that effect.

BIJUR, J., concurs in the result; GUY, J., dissents.

Judgment reversed, new trial ordered, with thirty dollars costs to appellant to abide event.

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ABRAHAM SEIDEN, Respondent, v. ADOLPH STERN, Appellant.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Pawnbrokers — licensed — when not liable for failure to deliver — pledge.

A licensed pawnbroker is not liable for failure to deliver a diamond ring pledged under an agreement that he was not to be accountable for its loss by robbery, where the ring was stolen from his place of business.

APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, fifth district, rendered in favor of plaintiff.

Michael J. Sweeney, for appellant.

Samuel G. Geller, for respondent.

COHALAN, J. The defendant is a licensed pawnbroker of this city and on November 23, 1914, the plaintiff pledged a diamond ring with him, for which plaintiff has recovered a judgment herein for the sum of twenty-five dollars for failure to deliver the same upon demand, and after tender of the amount due thereon.

Upon the trial the pawn ticket was introduced in evidence and printed thereon appeared these words: "Not accountable for loss, damage by fire, breakage or robbery."

No claim is made that these words would relieve the defendant from the consequences of his own negligence. The defense set up was that the ring had been stolen. The evidence as to the robbery was undisputed. On January 15, 1915, at a little after eight A. M. three men,

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then unknown to the defendant, entered the defendant's store, sprang the Yale lock from the inside, held revolvers pointed at the defendant's son and two of his employees, the only persons in the store at that time, then tied them together, and robbed the store, taking from the two safes used for storing pledges the goods therein, and left the store taking with them the stolen property. One of the persons committing the robbery is now serving a term in prison, and the other two are under indictment. It was shown that sometime between January 8 and January 12, 1915, the defendant took an inventory of his goods and that the diamond ring in question was placed in one of the safes from which the contents were taken by the robbers. It further appeared that one Dickler, one of the employees of the defendant in the store at the time of the robbery, was implicated in the matter, and presumably shared in the proceeds of the stolen goods, but it was also shown that Dickler had been in the defendant's employ for over three years prior thereto, and had come to him well recommended, and there was nothing shown from which a claim of negligence in his employment could be predicated. The defendant fully overcame any presumption of negligence arising from his failure to deliver the ring to the plaintiff in compliance with his demand, and the judgment cannot lawfully be sustained.

Judgment reversed, with thirty dollars costs to the appellant, and the complaint dismissed, with costs.

GUY and BIJUR, JJ., concur.

Judgment reversed, with thirty dollars costs.

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JAMES LACKAYE, Respondent, v. PENNSYLVANIA RAILROAD COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Carriers — action against — liability limited — trial.

Where on the trial of an action brought by an actor against a railroad company to recover for a trunk and contents lost during an interstate journey it appears that by arrangement between defendant and the company of which plaintiff was a member, in consideration of a reduced rate, the liability of defendant for the baggage of the members of the company was limited to $100, plaintiff cannot recover in excess of such amount.

APPEAL by the defendant from a judgment in favor of the plaintiff for the sum of $644.91, entered in the office of the clerk of the Municipal Court of the city of New York, borough of Manhattan, third district, after a trial before the court without a jury.

Burlingham, Montgomery & Beecher (George R. Allen, of counsel), for appellant.

O'Brien, Malevinsky & Driscoll (Alfred G. Steiner, of counsel), for respondent.

COHALAN, J. Plaintiff, an actor, sued to recover the sum of $645 for the loss of a trunk and its contents. The trunk was delivered to the defendant in Jersey City, and was checked for Philadelphia, Pa. The arrangements for the transfer were made by the A. H. Woods Production Company. This company employed the plaintiff, and in this transaction it was acting as his agent. The action having been brought to recover on a contract, the act of the plaintiff's representative has been ratified on the part of the plaintiff by this suit. *Green* v. *Clarke*, 12 N. Y. 343.

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The transfer of the baggage was interstate; hence it was subject to the provisions of the Interstate Commerce Act, particularly of the Carmack amendment thereto.

It appears that the A. H. Woods Production Company paid for twenty-five fares from New York to Philadelphia, at the rate of $1.80 a person. This arrangement included the fare of the plaintiff and the transfer of his baggage. It was a reduced rate, and it was subject to the defendant's rules and regulations with respect to rates and tariffs. The tariff provided that the liability of the defendant for the baggage of an employee of a theatrical company should be limited to the sum of $100. If a greater liability had been desired, that option rested with the plaintiff or his agent. He did not avail himself of this privilege, and it follows that the defendant was at liberty to invoke the limited liability in the sum of $100. *Boston & Maine R. Co.* v. *Hooker,* 233 U. S. 97; *Barstow* v. *N. Y., N. H. & H. R. Co.,* 158 App. Div. 665.

The defendant in the court below offered to allow judgment to be taken against it in the sum of $100. The court, however, allowed a recovery in the sum of $645.

The judgment is reversed, and a new trial ordered, with $30 costs to appellant to abide the event, unless plaintiff stipulates to reduce the judgment to $100, with interest thereon from January 23, 1915, together with costs in the court below, and in that event the judgment, as so modified, is affirmed, with costs of this appeal to the appellant.

GUY and BIJUR, JJ., concur.

Judgment modified, and, as so modified, affirmed, with costs.

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JOSEPH L. FRIEDER, Appellant-Respondent, *v.* ALEXANDER ADLERMAN, as Receiver, etc., Respondent-Appellant.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Assignment — of judgment — when title by receiver in supplementary proceedings not affected.

An assignment of a judgment to an attorney in consideration of legal services in obtaining the judgment, and in a prior action, is not affected by the title of a receiver in proceedings supplementary to an execution against the assignor thereafter appointed under an order granted prior to said assignment.

PLAINTIFF appeals from a judgment rendered in the Municipal Court of the city of New York, borough of Manhattan, seventh district, in his favor in the sum of $309, in a trial before the court without a jury, and the defendant appeals from so much of said judgment as awards the plaintiff the sum of $309.

Max Schleimer, for appellant-respondent.

Gallert & Heilborn (Walter S. Heilborn, of counsel), for respondent-appellant.

COHALAN, J. Plaintiff, an attorney at law, brought this action upon an assignment of a judgment, against the Chelsea Exchange Bank, to recover the sum of $533. The defendant, a receiver in supplementary proceedings, claimed the same fund, and thereafter, by an order of interpleader, the money was paid into court, and the receiver substituted as defendant for the Chelsea Exchange Bank.

The facts are practically conceded. On August 30, 1915, the plaintiff was retained by Joseph Doelger's Sons to commence an action to recover a penalty

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against the Chelsea Exchange Bank. It was agreed in writing that out of the recovery in that action, the plaintiff herein should receive fifty per cent for his services, with the costs of the action, and that the balance of the recovery he should apply on account of services theretofore rendered by him for the copartnership firm.

On October 18, 1915, judgment was rendered in favor of Joseph Doelger's Sons for $874.10, which upon appeal was reduced to the sum of $533. On October 20, 1915, Joseph Doelger's Sons assigned the judgment to the plaintiff. On April 29, 1915, an order in supplementary proceedings against the members of Joseph Doelger's Sons was secured, the same being based upon a judgment recovered against the copartnership firm on December 29, 1914. On January 6, 1916, the defendant was appointed and duly qualified as receiver of the property of the copartnership, and he made claim to the full amount of the judgment.

The case was tried upon admissions made in open court, no oral testimony having been taken. The court held that section 2469 of the Code of Civil Procedure was decisive of the issues involved. Under subdivision 1 thereof, he held that title vested in the receiver as of the date of the service of the supplementary proceeding order, which was April 29, 1915, and that this date was prior to the assignment to the plaintiff. He took into consideration, however, the provision at the bottom of the section, which reads: "But this section does not affect the title of a purchaser in good faith without notice and for a valuable consideration; or the payment of a debt in good faith and without notice."

The court found that the claim for legal services in obtaining the fund was conceded, and that the plaintiff was entitled to recover fifty per cent of the judgment

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plus the costs and disbursements. The balance of the fund he declared the defendant was entitled to receive, because the alleged allowance for previous services was for a past consideration, and, therefore, was not covered by the assignment.

On this appeal the plaintiff contends that he is entitled to receive under the assignment the entire fund, while the defendant asserts that the assignment is invalid, and that the plaintiff is not entitled to receive any part thereof.

The decision of the court was in effect to find that the assignment was valid as to fifty per cent thereof, and invalid as to the balance. If the assignment was good in any particular, it should have been so held in all particulars.

Moreover, even if the court below did have jurisdiction, the defendant failed to allege or prove any fraud in the transaction, and in the absence of fraud the assignment was conclusive upon the court. It is well settled that an assignment of a judgment, in consideration of services rendered in a prior action, and also in the action in which the judgment is recovered, is conclusive, and may not be held unlawful. *Zogbaum* v. *Parker,* 55 N. Y. 120; *Matter of Havemeyer,* 27 App. Div. 123. See also *Droege* v. *Baxter,* 69 App. Div. 58–62.

The defendant conceded that the plaintiff rendered certain legal services, and the court found as a fact that the plaintiff was a purchaser in good faith without notice and for a valuable consideration. The retainer and the assignment both recite that they were executed for valuable considerations, at least sufficient to render them legal and valid instruments. In fact, on the trial the question of the *bona fides* of the retainer agreement and the assignment of the judgment was not raised.

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The judgment rendered herein should be modified by increasing the amount awarded to the plaintiff from $309 to $541.08, with appropriate costs in the court below, and with $25 costs to plaintiff on this appeal.

GUY and BIJUR, JJ., concur.

Judgment modified.

DAVID KRAUS, Respondent, *v.* HERMAN H. CAMMANN, EDWARD C. CAMMANN, CHARLES H. VOORHEES and WILLIAM FLOYD, Copartners, Doing Business Under the Firm Name and Style of CAMMANN, VOORHEES & FLOYD, Appellants.

(Supreme Court, Appellate Term, First Department, May, 1916.)

New trial — when granted — action to recover broker's commissions — trial — verdict.

Where in an action by one real estate broker against another to recover an alleged agreed one-third of the commission received by defendant in the event of the sale, lease or exchange of a certain parcel of real estate, it is undisputed that a lease of said parcel and another was effected by defendant who received a commission, a verdict in favor of plaintiff for the full amount of one-third of the commission was clearly against the weight of evidence and the judgment entered thereon will be reversed and a new trial granted.

APPEAL by defendants from a judgment of the City Court of the city of New York, entered on a verdict and from an order denying a motion for a new trial.

Delafield, Howe & Rogers (John M. Holzworth and John Ross Delafield, of counsel), for appellants.

Joseph Rosenzweig, for respondent.

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PENDLETON, J. Appeal by defendants from a judgment entered on a verdict and from an order denying a new trial.

The action is brought by a real estate broker against another real estate broker to recover a share of a commission received by defendants on the leasing of certain property.

Plaintiff alleges an agreement between defendants and himself whereby in the event of a sale, lease or exchange of a certain parcel of real estate, plaintiff should have one-third of the commission.

It is not contradicted that a lease of the premises specified in the complaint with another parcel was effected and that a commission therefor was received by defendants.

At the trial plaintiff contended that under the contract he was entitled to one-third of the entire commission. Defendants contended that the contract with plaintiff referred only to a sale or exchange of the property referred to and did not include a lease of the same, and that in no event could plaintiff be entitled to share in the commission as to any other property than 167–169 Pearl street specified in the complaint, and defendants requested the court to charge that, in the event the jury finds that the plaintiff is entitled to a verdict, his verdict is limited to one-third of the commission on the premises 167–169 Pearl street and not to the whole property including Mr. Eno's property and the building upon it. This was refused and the jury returned a verdict for the full amount of one-third of the entire commission.

The jury must have found therefore that the contract covered a lease as well as a sale or exchange and included one-third of the entire commission received on the lease of the parcel 167–169 Pearl street and the other adjoining property.

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So far as the finding that the contract covered a lease as well as a sale or exchange is concerned, there was sufficient evidence to support it, but on the question as to the contract's including one-third of the commission on other property, it was clearly against the weight of evidence. Not only does the contract, as set forth in the complaint, relate solely to the premises 167–169 Pearl street, but by no fair construction can the arrangement as testified to by plaintiff be held to be more than an agreement to share in any commission earned by the sale, exchange or lease of the specific parcel of which plaintiff had charge. Giving the fullest significance to the language used, as testified by him, it fails utterly to show more than that. The suggestion that plaintiff was to receive one-third of the commission realized from the lease of other property than the one he represented is entirely unwarranted by the testimony of plaintiff himself as to the terms of the contract.

LEHMAN and WHITAKER, JJ., concur.

Judgment reversed, and new trial granted, with costs to appellants to abide event.

ANTONIO CHIAPPISE, Appellant, *v.* FREDERICK L. CRANFORD, INC., Respondent.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Negligence — action to recover for personal injuries — pleading.

Under the allegations of the complaint in an action founded on the Employers' Liability Act to recover for personal injuries alleged to have been caused by the negligence of defendant's foreman, a notice stating as the cause of said injuries that

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while plaintiff was holding fast to the tongue of a truck with a lever attached to the center of the axle, used by defendant for the purpose of picking up an iron beam, the foreman negligently let go of the beam and it fell on plaintiff's foot, is sufficient to sustain the action.

APPEAL by plaintiff from a judgment of the City Court of the city of New York dismissing the complaint after a trial by the court and a jury.

Hobart S. Bird, for appellant.

Jesse W. Johnson, for respondent.

PENDLETON, J. This is an appeal from a judgment dismissing the complaint for failure of proof.

The action is founded on the Employers' Liability Act and brought to recover damages for injuries alleged to have been caused by the negligence of defendant's superintendent.

The complaint alleged that defendant employed a certain two-wheeled truck with a lever attached to the center of the axle for the purpose of picking up iron and steel beams from the ground by means of a chain attached to said lever and transporting them in and about the building of a subway. That plaintiff was engaged with the superintendent in holding suspended from said truck an iron beam by holding fast with their hands at the end of the handle of said lever. That the superintendent or foreman negligently without warning let go of said lever; that the weight of the beam was sufficient to and did raise plaintiff from the ground, and losing his hold upon the lever he fell to the ground and the beam at the same time descended and fell on his foot.

At the trial plaintiff offered in evidence the notice served on defendant in pursuance of the requirements

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of the Employers' Liability Act. It was objected to as "immaterial and not a notice referring to the cause of action stated in the complaint" and excluded.

A motion to allow the withdrawal of a juror, in order that plaintiff might apply at Special Term to amend the complaint, was denied and exception taken. There being no other evidence of a notice, the complaint was dismissed.

The notice stated as the cause of the injuries that while plaintiff was holding fast to the tongue of said truck the foreman negligently "let go of said beam and said beam was allowed to fall down upon plaintiff's foot." Assuming that the complaint correctly sets forth the facts as to how the accident occurred the question is, did the notice, to use the words of *Finnigan* v. *New York Contracting Co.*, 194 N. Y. 244, "with reasonable definiteness and completeness, in however informal and inartistic manner, indicate the negligent or wrongful misconduct of the employer really claimed to have been the cause of the accident and really relied on as the basis of the complaint against him, that he may by virtue of such seasonable notice investigate and prepare to defend against the charge thereafter actually to be prosecuted." According to the complaint the injury was directly occasioned by the beam falling on plaintiff's foot and this was caused by the superintendent or foreman letting go the handle of the lever, by reason whereof the beam descended and fell on plaintiff's foot. According to the notice the direct cause of the injury was the falling of the beam on plaintiff's foot and this was caused by the foreman's letting go of said beam so that it was allowed to fall on plaintiff. The plain gist of both is the charge that the foreman by releasing the hold on the beam caused or allowed it to fall on plaintiff. Whether plaintiff was raised from the ground

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and then fell, or the foreman allowed the beam to fall by letting go of the beam itself or the tongue or handle or lever, whatever it may be called, which held the beam up, are immaterial details. *Sherman* v. *Mason & Hanger Co.*, 162 App. Div. 327. As was said in *Bertolami* v. *United Engineering Co.*, 198 N. Y. 71, the defendant was notified of that which fell upon the injured employee and was apprised of the claim that it was responsible by reason of the negligence of its representative in letting or causing the thing to fall. It seems manifest that any one familiar with trucks of this character and the way they are used could not fail to be sufficiently apprised of plaintiff's claim as to the cause of the injury to investigate and prepare to defend the action.

LEHMAN and WHITAKER, JJ., concur.

Judgment reversed and new trial granted, with costs to appellant to abide event.

NATHAN FASS, Appellant, *v.* ILLINOIS SURETY COMPANY, Respondent.

(Supreme Court, Appellate Term, First Department, May, 1916.)

Estoppel — surety bonds — default — action on bond — when time for filing further proofs expired.

Where a surety company bond required that the surety should be given written notice within forty-eight hours after any default on the part of the principal in making payment for materials furnished and not later than thirty days after any such default to file with the surety "written proofs" of the principal facts, a letter advising the surety of an alleged default and requesting an immediate payment of the amount not paid, otherwise proceedings to enforce collection would be com-

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menced, is sufficient "written proofs" within the condition of the bond in the absence of proof that defendant in an action on the bond notified plaintiff that it deemed the letter insufficient, and the time for filing further proofs having expired defendant was estopped from claiming that said letter was insufficient.

Lehman, J., dissents.

APPEAL by plaintiff from a judgment of the City Court of the city of New York after a trial before the court without a jury.

David Friedman (Charles C. Peters, of counsel), for appellant.

Nelson L. Keach (L. Laflin Kellogg), for respondent.

PENDLETON, J. This is an appeal by plaintiff from a judgment entered after a trial before the court without a jury.

The action is on a surety company's bond to secure payment to plaintiff of an amount agreed to be paid for labor and materials to be furnished.

The bond required that the surety company should be notified in writing of any default on the part of the principal within forty-eight hours after the occurrence of such default, and that not later than thirty days after the occurrence of any such default the insured or obligee should file with the surety company "written proofs" of the principal facts showing such default and the date thereof. The defendant contends and the court below found that this condition had not been complied with and the correctness of that ruling is involved in this appeal.

It seems very clear, both on principle and authority, that two things are required by the above provisions, viz., notice of default and "written proofs" of the principal facts as to default, but that this does not

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necessarily mean that separate papers or documents must be furnished and that if sufficient for the purpose both the "notice" and "written proofs" may be contained in one instrument or paper.

In this case a letter was addressed to the defendant, signed in plaintiff's name by his attorney, advising it of the fact of the alleged default and concluding with the request that defendant make immediate payment of the amount not paid and the statement that otherwise he (plaintiff) would be obliged to engage counsel to enforce collection thereof. Strictly speaking the letter is in form a notice only but does, in effect, contain a statement of fact. Even so, however, it may be conceded that standing alone and without the concluding clause it falls short of a compliance with the conditions of the bond. The concluding sentence, however, was a plain indication that plaintiff considered he had done all that was required of him to entitle him to payment and therefore that the letter was intended as both the notice and the proof called for by the bond, otherwise the demand for payment was meaningless. The defendant on the receipt of this letter including such demand must have understood that the plaintiff considered it a compliance with the provisions of the bond and under such circumstances was required in the exercise of good faith, if it deemed the letter insufficient, to so notify plaintiff; not having done so plaintiff was entitled to assume it was sufficient and rely thereon and the time for filing further proofs having expired, defendant is estopped from now claiming that the letter is insufficient. *O'Reilly* v. *Guardian Mutual Life Ins. Co.*, 60 N. Y. 169–174; *Glazer* v. *Home Ins. Co.*, 190 id. 6. It is not a question of waiver of performance which must be pleaded as where there is a total failure to give notice or alleged proofs and waiver is relied on,

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but defendant is estopped from asserting that the letter is not performance. The object of the condition in the bond is that the surety shall be given an opportunity to investigate and satisfy itself before being called upon to pay, and it was urged on the argument that defendant, after the receipt of the letter in question, expected and was entitled to expect that it would be furnished with further proofs and relying thereon made no investigation of the facts. It is manifest, however, that by the letter purporting to contain information and calling upon defendant to pay, it was apprised of plaintiff's claim that no further proof was required. It could then have proceeded on the facts presented or, if it deemed these insufficient under the provisions of the bond, have notified plaintiff in order that he might give more. It could not lull plaintiff into inaction until the time had elapsed and then claim the proofs insufficient.

Judgment reversed, with costs, and judgment directed for plaintiff for $950, with interest and costs in the court below.

WHITAKER, J. (concurring). I concur with Mr. Justice Pendleton that the judgment should be reversed.

Upon the receipt of the notice concededly given by plaintiff and received by defendant, the defendant did nothing.

If the defendant required any additional proof or information, common honesty required it to request such further proof or information which it purposely failed to do. Defendant has suffered no loss by the alleged failure of the plaintiff to strictly comply with the terms of the policy and is seeking to avoid its honest obligation by a technical construction of a contract drawn by itself.

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LEHMAN, J. (dissenting). The plaintiff sues upon a contract of suretyship made by the defendant. The contract provided that "said Surety shall be notified in writing of any act, omission or default on the part of the said principal, or his, their or its agents, or employees which may involve a claim or loss for which the said Surety is or may be responsible hereunder, within forty-eight hours, after the occurrence of such act, omission or default shall have come to the knowledge of the owner or his, its or their agents, officers or representatives; said notification must be given by a United States Post Office registered letter mailed to the said Surety at its principal office in Chicago, Illinois; and in any event, not later than thirty days after the occurrence of any such default, the owner shall file with the Surety at its principal office in the City of Chicago, Illinois, written proofs of the principal facts showing such default and the date thereof."

The justice below has held that the plaintiff has failed to comply with this provision of the contract in that he did not file with the surety *written proofs* of the principal facts showing such default and the date thereof. It appears that the default occurred on August second, and that the plaintiff, within forty-eight hours, sent to the defendant an instrument in writing as follows:

"ILLINOIS SURETY CO.,
"Chicago, Ill., and 5 Nassau Street,
"Borough of Manhattan, City of New York:

"GENTLEMEN.— Please to take notice that on June 13th, 1912, you executed a bond for the Bethel Construction Co., as principal, and the undersigned, for Nine Hundred and Fifty ($950) Dollars, which was given to secure the undersigned, Nathan Fass, who furnished all labor and materials for the painting and paper hanging on the two new buildings in the course of the

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erection on the westerly side of Fulton Avenue, distant one hundred (100) feet south of 171st Street, in the Borough of Bronx, City of New York.

"That the undersigned has completed his contract, and furnished all the material, work, labor and services pursuant to and in accordance with his contract, and is entitled to receive the sum of Nine Hundred and Fifty ($950) Dollars.

"That the owner, viz: The Bethel Construction Co., has defaulted in the payment of the sum of Nine Hundred and Fifty ($950) Dollars, which was due to me upon the completion of said work mentioned in said contract, and which work was completed on August 2nd, 1912.

"Kindly mail check to me for the sum of Nine Hundred and fifty ($950) Dollars, otherwise I shall be obliged to engage counsel to enforce the collection thereof.

"NATHAN FASS,
"2257 Seventh Avenue,
"Borough of Manhattan,
"City of New York.
"By DAVID FRIEDMANN,
"*Attorney for Nathan Fass,*
"Office & P. O. Address,
"309 Broadway,
"Borough of Manhattan,
"New York City."

It is not disputed that this instrument constitutes a sufficient notice but the plaintiff failed to file any further proofs and he has not complied with the conditions of the contract unless this letter is to be regarded not only as notice but also as proof of default.

It is to be noted that this letter begins with the words "Please to take notice" and that every state-

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ment of fact contained therein is connected with these words by the word "that." In other words the letter contains no direct statement of fact except in so far as a statement of fact may be implied from a notice that certain events have occurred. It is not verified and it is not signed personally by the plaintiff but is signed by his attorney. It seems to me impossible to hold that under any circumstances this instrument constitutes proofs within the meaning of the contract. The contract provides specifically for notice of default *and* proofs of the principal facts and it is clear that the parties contemplated that the proofs must be something more than a mere notice. Even though it may well be that the filing of proofs of the principal facts would, of itself, constitute also notice of the default, the converse is not true and a filing of notice of default would not of itself be a compliance with the condition that proofs of the principal facts must also be filed. It is difficult if not impossible for the court to lay down a general rule as to what writings would constitute "written proofs." In the case of *O'Reilly* v. *Guardian Mutual Life Insurance Co.*, 60 N. Y. 169, the court stated: "What the character of the 'proof' should be when not prescribed by the terms of the policy must depend very much upon the fact to be proved, and the evidences by which it is ordinarily established, or of which it is susceptible. But that proof, as that term is used, means something more than the unverified declaration of the party in interest, whether formal or informal, may be laid down as a self-evident proposition." In this case the instrument is unverified and if an unverified statement is never to be regarded as proof then, of course, this instrument does not constitute "proof." I think, however, that such a rule would be too strict for universal application and that the court in that case intended to state as a "self-evi-

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dent proposition," only that an unverified declaration of the party is not proof "as that term is used" in the contract there under consideration. I think that the true rule to be applied in each case in accordance with the circumstances of the case is contained on page 173 of that opinion. "It need not be that full, clear and explicit proof which would be required upon the trial of an issue upon the question, but it must be such reasonable evidence as the party can command at the time to give assurance that the event has happened upon which the liability of the insurers depends. *Walsh* v. *Washington Marine Ins. Co.*, 32 N. Y. 427. The purpose of the condition is that the insurer may be able intelligently to form some estimate of his rights and liabilities before he is obliged to pay and some proof must be exhibited. It seems to me quite clear that though we give the words "written proofs" the most liberal interpretation in order to avoid a forfeiture, yet a mere letter signed by an attorney who is not presumed to have any knowledge of the facts and containing no statement of fact except statements joined by the word "that" to the words "please take notice" can constitute no basis for any estimate by the surety of its rights and liabilities and can constitute no "written proofs."

It is urged now that even if the instrument does not constitute any written "proofs" yet since the defendant has retained the instrument without demand for further proof until after the time for filing proofs had expired, the defendant is estopped from now claiming that the letter is insufficient. I agree that the doctrine of estoppel is peculiarly applicable to this class of cases. Since no general rule can be laid down as to what writings are sufficient to constitute written proofs "as that term is used" the courts should hold the surety company estopped from raising a claim that

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sufficient proof has not been furnished, if by act or omission it has led the insured to refrain from furnishing such further proof as would be a compliance with the contract. In this case the claim of estoppel is based upon the failure to object to the letter as sufficient proof or to demand further proof. Obviously such a claim cannot be sustained unless the insurance company had notice that this letter was intended as proofs. If the letter was sufficient as a notice and did not purport to be more than a mere notice, then as the Court of Appeals stated in the case of *O'Reilly* v. *Guardian Mutual Life Insurance Company, supra*: "it would have been impertinent to have notified the plaintiff that a paper, not purporting to be proof was not sufficient proof." The letter is insufficient as written proofs, it was sufficient as a notice and there is nothing in the letter to show that it purported to be more than a mere notice unless its conclusion "Kindly mail check to me for the sum of Nine Hundred and fifty dollars, otherwise I shall be obliged to engage counsel to enforce the collection thereof" should be regarded as a notice of plaintiff's belief that the instrument was a compliance with the contract.

I do not think these words can be given any such effect. The contract required notice of default to be given within forty-eight hours and the insured had thirty days to file written proofs. The request or demand for payment was not enforcible until the written proofs were filed and both the plaintiff and the defendant are presumed to have known this. Such a request or demand for payment before all the technical conditions are complied with is not, however, so unusual as to give rise to any fair inference that the plaintiff believed that he had complied with all the conditions or that he did not intend to proceed to comply with the other conditions precedent to a right

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to make such a demand. It seems to me clear that in view of the form of the notice, the defendant was entirely justified in regarding the instrument only as one purporting to be a notice. Under such circumstances it was not bound to reply to a demand or request for payment which was clearly not justified at that time. The very form of the letter, and the fact that as a notice it was served within the time specified in the contract, justified the defendant in believing that the plaintiff would follow up the notice with the required proofs which would enable it to form some estimate of its liability before payment. The failure to reply to this notice constitutes no acquiescence in any claim of plaintiff that it is a compliance with the contract not only because the defendant was not in fairness called upon to reply to it but also because it does not, on its face, show any such claim in which defendant *could* acquiesce.

It follows that judgment should be affirmed, with costs.

Judgment reversed, with costs.

ROSA WIEDERMAN, Appellant, *v.* MAX VERSCHLEISER, Respondent.*

(Supreme Court, Appellate Term, First Department, May, 1916.)

Brokers — employment of, to procure purchaser of leasehold property — action to recover commissions — pleading — contracts — evidence. Pleading — allegations of affirmative defense — answer — contracts — evidence — Code Civ. Pro. § 522.

The employment of a broker to procure a purchaser for a leasehold interest in real estate may be proven either by oral testimony or by a writing, and the contract is performed when

* See 93 Misc. Rep. 453.—[REPR.

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the broker procures a purchaser ready, able and willing to take the property at the seller's terms.

Where the complaint in an action by the broker to recover the agreed commission alleges facts showing plaintiff's performance and defendant's default in paying the commission, it will be assumed on appeal from a judgment for the dismissal of the complaint that its allegations are true.

It was not essential to a recovery that plaintiff should prove the execution of a written contract between defendant and the intending purchaser.

Under section 522 of the Code of Civil Procedure the allegations of an affirmative defense that a contract under seal, a copy of which was annexed to the answer and made a part thereof, was the agreement set forth and referred to in the complaint, will be deemed to be controverted so that after defendant had put in the contract under seal to establish his defense plaintiff had the right to offer testimony showing want of consideration or fraud.

MEMORANDUM on plaintiff-appellant's motion for reargument.

Harry Stackell, for appellant.

Kantrowitz & Esberg (Moses Esberg, of counsel), for respondent.

Per Curiam: Appellant asks for a reargument of appeal from judgment of the City Court dismissing complaint, and from order denying motion for new trial.

In this action to recover broker's commissions the complaint alleges that in February, 1914, the defendant employed the plaintiff and the plaintiff in consideration of the sum of $600 to be paid by defendant agreed to procure a purchaser for a leasehold interest owned by defendant in certain real property upon stated terms and conditions; that thereafter the plaintiff, pursuant to the employment, procured a purchaser

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ready, able and willing to purchase the said leasehold interest upon the terms and conditions stated, and that said purchaser entered into a contract with the defendant for the purchase of said interest; that the defendant has defaulted in the performance of said contract with the purchaser and has also, after demand, failed to pay plaintiff any part of the consideration of $600, except the sum of $50.

After denying in his answer material allegations of the complaint defendant set up as an affirmative defense that on February 19, 1914, the parties for a valuable consideration entered into an agreement in writing, under seal, a copy of which is annexed to the answer marked A (hereinafter referred to as exhibit A) and made a part thereof; that said agreement is the alleged agreement of employment referred to in the complaint; and that subsequently to the execution of said agreement the plaintiff obtained a party who entered into a contract with the defendant for the purchase of the property, but that said party defaulted in the performance of the contract. A reference to exhibit A, signed by the broker and the defendant, shows that it was therein agreed that unless the agreement of sale was consummated the plaintiff should not be entitled to any commissions for his services.

At the opening of the trial the learned trial justice asked plaintiff if he admitted that "this paper," the alleged contract (exhibit A) set up in the affirmative defense, was signed by the plaintiff before the contract for the purchase and sale of the leasehold was made, and plaintiff's counsel stated that such was the fact, but that the broker's signature was obtained by false and fraudulent representations and that there was no consideration for the written contract. The court thereupon dismissed the complaint upon the ground, as appears from the record and the opinion

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handed down, that the plaintiff as a condition precedent to recovery was bound to go into a court of equity and have a written contract, exhibit A, cancelled and set aside, the City Court having no jurisdiction of such an action. This ruling requires a reversal of the judgment.

In the first place, the contract set up in the affirmative defense is not (although the trial justice assumed it is) the basis of the plaintiff's cause of action, and the case contains no admission to that effect. Plaintiff's suit is based on the employment alleged in his complaint, an employment which could have been proven by either oral testimony or by a writing; and, as alleged, the contract was performed when he procured a purchaser ready, able and willing to take the property at the seller's terms (*Tanenbaum* v. *Boehm*, 202 N. Y. 293), and the complaint stated facts showing performance and defendant's default in making the stipulated payment to the plaintiff. The fact that exhibit A was executed before the making of the contract of sale by the defendant and the purchaser is not of controlling significance, because it must be assumed on the appeal from the dismissal that the allegations of the complaint are true; and it was not essential to a recovery by plaintiff that he should prove the execution of a written contract by the defendant and the purchaser.

In the second place, the allegation of the affirmative defense that exhibit A was the agreement alleged in the complaint and under which the broker and the owner acted was deemed to be controverted (Code Civ. Pro., § 522); so that after defendant put in exhibit A to establish his affirmative defense the plaintiff would then have a right, even in the City Court, to introduce evidence showing that by reason of lack of consideration (*Hough* v. *Baldwin*, 50 Misc. Rep.

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546), or because of fraud (*Whipple* v. *Brown Bros.*, 170 App. Div. 531), the writing was not binding upon the parties.

The motion for reargument should be granted and the judgment and order reversed and a new trial ordered, with costs to the appellant to abide the event.

Present: GUY, BIJUR and WHITAKER, JJ.

Motion for reargument granted.

JOHN TOOHILL, Respondent, *v.* NEW YORK AND QUEENS GAS COMPANY, Appellant.

(Supreme Court, Appellate Term, Second Department, May, 1916.)

Accord and satisfaction — evidence — action to recover salary — termination of employment by notice.

Where a gas company doing work in city streets under a proper permit was to pay for the services of an inspector, appointed to act for the city, during the time the work to be done under the permit should be in actual progress, the burden is on plaintiff in an action to recover salary to show the continuance of the work, the defendant being under no obligation to terminate plaintiff's employment by notice.

Where plaintiff on asking for his pay was told that he would get nothing unless he signed receipts in full to date, and he did so, after which he was paid in amounts stated therein, there was an accord and satisfaction.

Kapper, J., dissents.

APPEAL from a judgment and order of the Municipal Court of the City of New York, fourth district, borough of Queens, in favor of the plaintiff.

P. F. W. Ruther, for appellant.

William A. McLaughlin, Jr., for respondent.

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JAYCOX, J. I agree with my brother Kapper in every respect save two, and they are the termination of plaintiff's employment and the question of accord and satisfaction. The plaintiff is employed for no fixed period. The provision in his appointment for payment "at the rate of $100 per month" fixes no period of employment. His appointment was to act as corporation inspector in connection with the work being carried on in the borough of Queens by the New York and Queens Gas Company. It would therefore appear that the plaintiff's employment was limited to the time when that company was doing work in the streets.

The necessity of a permit from the department of water supply, gas and electricity is conceded. The defendant, in this case, obtained such permits. The 7th condition in the permit provides for forty-eight hours' notice to the borough engineer before any work is done under it. This permit further expressly provides: "No work shall be done except under the supervision, to the satisfaction of, and in the presence of inspectors appointed by the Commissioner of Water Supply, Gas and Electricity, and the said company shall pay for the services of said inspectors at the rate of one hundred ($100) dollars per month each, during the time the work under this permit shall be actually in progress." Under this permit the defendant was only to pay the inspector "during the time the work under this permit shall be actually in progress."

The plaintiff is entitled to recover his pay at the rate of $100 per month for such period only as the work under the permit issued to the defendant was actually in progress. The burden of proof is upon the plaintiff to establish the continuance of the work. I am of the opinion that the defendant was not required to send any notice terminating plaintiff's employment.

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I am further of the opinion that there was an accord and satisfaction. When the plaintiff asked for his pay he was told that he must sign the receipts which were in evidence or he would get nothing; whereupon he signed the receipts in question, each of which recited that the payment then made was in full to date. After he had signed this receipt he was paid. This brings the case clearly within the doctrine stated in *Fuller* v. *Kemp,* 138 N. Y. 238, where it is said: "When a tender or offer is thus made, the party to whom it is made has no alternative but to refuse it, or accept it upon such condition. If he takes it, his claim is cancelled, and no protest, declaration or denial of his, so long as the condition is insisted on, can vary the result." *Nassoiy* v. *Tomlinson,* 148 N. Y. 326; *Genung* v. *Village of Waverly,* 75 App. Div. 610; *Komp* v. *Raymond,* 42 id. 32. The same doctrine applies whether the dispute arises over a question of fact or of law. *Jackson* v. *Volkening,* 81 App. Div. 36, affd., 178 N. Y. 562; *Dunn* v. *Whalen,* 120 App. Div. 729, 731.

I advise that the judgment and order be reversed, with thirty dollars costs, and judgment directed for the defendant dismissing the complaint, upon the merits, with appropriate costs below.

CLARK, J., concurs.

KAPPER, J. (dissenting). The judgment awarded plaintiff a recovery representing the amount alleged to be due him as a "corporation inspector," for inspecting the work done by the defendant in public streets under permits issued by the department of water supply, gas and electricity in the borough of Queens. The defendant, as its name implies, is a public service corporation for the supplying of gas. Plaintiff's work is said to have commenced when he

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received an appointment in writing, dated September 18, 1914, signed by the acting commissioner of the department, the material portion of which is as follows: "Beginning tomorrow (Saturday) you may until further notice act as corporation inspector in connection with the work being carried on in the Borough of Queens by the New York and Queens Gas Company. You will be paid by them at the rate of $100. per month." Plaintiff claims to have reported for duty on September 19, 1914, and that he continued in his work until February twentieth, following. His services were described as seeing to it that the mains installed by the defendant in public streets "were installed according to the plans submitted by the" defendant to the department, and "that the defendant performed the work of laying mains in the proper manner * * * according to the plans submitted." He further says that this work was carried out in such sections of the borough of Queens as covered the defendant's business operations, and that he was required to report his inspections to the department twice a week. He claims that the $100 a month is salary and that its payment by the defendant should continue until the department notified him that his designation was revoked.

The defendant does not dispute plaintiff's appointment, and expressly admits plaintiff's assignment to this work; but contends that it was obliged to pay the plaintiff only for the actual days spent by him in inspection, and that it was incumbent upon the plaintiff to establish the number of days so spent by him, and for which the defendant should only pay the ratable proportion on the basis of $100 a month. When the defendant was about to open streets for the purpose of laying mains or making connections therewith, it required and obtained a permit from the department

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of water supply, gas and electricity for each independent street opening, which permits contained the following provision: "No work shall be done except under the supervision, to the satisfaction of, and in the presence of inspectors appointed by the Commissioner of Water Supply, Gas and Electricity, and said company shall pay for the services of said inspectors at the rate of one hundred ($100) dollars per month each, during the time the work under this permit shall be actually in progress." It seems that several openings might be made contemporaneously with each other and the completion of the work under the several permits would frequently overlap each other, so that an opening might be left for several days without the work being finally completed while other openings were being made and work done therein.

The defendant does not dispute the right of the city department to designate an inspector to its work when carried on in public streets, nor its duty to pay the reasonable cost of such inspection. The rate fixed in the permit, $100 a month, must be regarded as reasonable in view of the defendant's acceptance of the permit with the condition attached. The question is not as to the time of the commencement of the inspection which is admitted to have been upon the issuance of the permit, but the time of its completion. The view I take of the plaintiff's designation is that it was in the nature of an employment to which the defendant became a party and agreed when it asked for and received permits to open the streets and work therein, without which permits the necessary work could not be done. That the city department in question possesses cognizance and control over the matter of laying gas mains in the streets of the city was decided in *People ex rel. Queens Borough Gas & El. Co.* v. *Connolly,* 89 Misc. Rep. 555. The grant of power in

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a city charter to regulate the use of the streets implies the power to impose all such reasonable conditions in relation to their use as will tend to the accomplishment of the municipal duty to provide for the general welfare and safety of the community in that respect. *City of Buffalo* v. *Stevenson,* 207 N. Y. 258. As a condition of granting a permit for street openings, the department having cognizance and control over such streets may require the public service corporation to pay the salaries of such inspectors as the department may assign to the work of inspection, in so far as there is no abuse of the power by the designation of an unnecessary number of inspectors or the designation of inspectors at an unreasonable rate of compensation. *People ex rel. Consolidated Tel. & El. S. Co.* v. *Monroe,* 85 App. Div. 542; affd., without opinion, 176 N. Y. 567; *People ex rel. Queens Borough Gas & El. Co.* v. *Connolly, supra.* If, then, we regard the designation of an inspector by the city department to the street work to be carried on by a public service corporation as an employment, the only reasonable construction here is that this employment continued until the corporation terminated it by notice to the department which designated the inspector that its work in the streets had been completed and that the services of the inspector were no longer needed. This is the only practicable result that the situation can properly work out. An inspector who undertakes such an assignment holds himself in readiness to investigate and report the work which the defendant is doing in the public streets. Such work may be at one point on one day and at another or several other points on the same day or on some other single day. The work so overlaps as to render it impossible to make payments for this inspection ratably on a single street opening. And, where a public service corporation which

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as an essential part of its franchise is required to make frequent street openings and to do so is obliged to accept the services of an inspector detailed and assigned thereto by the department having cognizance and control of the streets in which the corporation operates, it is neither a hardship nor an unreasonable exaction upon it to require it to notify the department that the work is completed and that inspection is no longer necessary, and that it, therefore, terminates the inspector's employment. Down to that time the inspector is entitled to his salary at the rate of $100 per month. If the good faith of the corporation in the termination of the employment arises or is presented, that can be determined as any question of fact. Likewise, as to the possible insistence of either the inspector or the commissioner of the department that the work is not in fact completed, so as to entail further inspection. But to bring about an ending of the inspector's designation, the duty is upon the corporation to notify the department of the completion of the work under the permits, and as that was not done in this case the defense that the work was finished before the end of the period sued for must fail. If the circumstances show an employment which could only be terminated in the manner pointed out, the doctrine of accord and satisfaction cannot be invoked to defeat the plaintiff's claim, as the amount to which he was entitled was not the subject of dispute and the receipt by him of a sum less than that for which the defendant was liable, even if said to be "in full," cannot satisfy the whole of a liquidated debt. *Evers* v. *Ostheimer,* 37 Misc. Rep. 163; *Ryan* v. *Ward,* 48 N. Y. 204. The plaintiff was, therefore, entitled to be paid for the five months for which he sued, less the amount which the defendant paid him on account, which, in this case, was $240 instead of $196, as

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admitted. The judgment should be modified by reducing the plaintiff's recovery to $260, with appropriate costs in the court below, and, as modified, the judgment should be affirmed, without costs.

Judgment and order reversed, with costs.

HENRY C. TUCKER, Plaintiff, *v.* THE WESTERN UNION TELEGRAPH COMPANY and THE GOLD AND STOCK TELEGRAPH COMPANY, Defendants.

JAMES F. DEE, Plaintiff, *v.* THE WESTERN UNION TELEGRAPH COMPANY and THE GOLD AND STOCK TELEGRAPH COMPANY, Defendants.

GEORGE H. MILLENER, Plaintiff, *v.* THE WESTERN UNION TELEGRAPH COMPANY and THE GOLD AND STOCK TELEGRAPH COMPANY, Defendants.

JAMES L. HOLLAND and JOHN MACK, Plaintiffs, *v.* THE WESTERN UNION TELEGRAPH COMPANY and THE GOLD AND STOCK TELEGRAPH COMPANY, Defendants.

THOMAS E. HOGAN, Doing Business as J. R. HEINTZ & Co., Plaintiff, *v.* THE WESTERN UNION TELEGRAPH COMPANY and THE GOLD AND STOCK TELEGRAPH COMPANY, Defendants.

(Supreme Court, Erie Special Term, June, 1915.*)

Injunction — to restrain discontinuance of stock quotations to patrons of telegraph companies — contract between stock exchange and telegraph company regulating service.

A stock exchange has an absolute property right in quotations collected and compiled by it, the value of which is measured by the publicity given them.

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* Received too late for insertion in proper place.—[REPR.

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Assuming that a telegraph company has a right to purchase such quotations from an exchange it has not the right to do so unless it has also the right to dispose of the information on equal terms to all who may legally require it; but as such information might be used unlawfully the stock exchange may control the business to the extent of requiring the telegraph company to refuse the service to any one making unlawful or improper use of it.

Where, in an action to restrain defendants from discontinuing furnishing to plaintiffs quotations of the New York Stock Exchange by means of "tickers," it appears that plaintiffs have for years had such service and paid for it, and are prepared to pay for it in the future, and to conform to all reasonable regulations, and no claim is made that they or any of them have ever used or contemplate using the service for unlawful or improper purposes, and a contract between the stock exchange and the telegraph company provides that the patrons of the telegraph company, to receive the service, must be approved by the exchange, plaintiffs cannot arbitrarily be refused such service so long as it is furnished to others in like business, and the burden of proof is upon the exchange to show a violation of the terms and conditions of the contract between it and the telegraph company if it undertakes to deprive a patron of the service.

The private rights of plaintiffs involved being capable of enforcement in the courts, plaintiffs are not confined to an application to the public service commission when in the meantime their business is greatly, if not totally, interfered with; the remedy by injunction is the only one adequate for the situation.

The furnishing by a telegraph company of stock quotations to others than those approved by the stock exchange is not a violation of section 552 of the Penal Law.

APPLICATION by the defendants to vacate a temporary injunction heretofore granted in this action restraining defendants from discontinuing to furnish to the plaintiffs quotations of the New York Stock Exchange by means of "ticker" and "fast wire" service.

The New York Stock Exchange, although not a party to this action, was represented by counsel on the argument.

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Simon Fleischmann and James O. Moore, for plaintiffs.

Hoyt & Spratt (Rush Taggart, of counsel), for defendants.

John G. Milburn, for Stock Exchange.

POOLEY, J. The complaint alleges, and the answer admits, that the plaintiff has for a long time past, and now is, engaged in the business of dealing in shares of stock, securities and commodities, and for that purpose has maintained an office in the city of Buffalo; that the defendant Western Union Telegraph Company is a domestic public service telegraph corporation, under the laws of the state of New York, and has assumed the obligation to render equal service to the public, for just and reasonable rates, without favor or discrimination, and that it maintains and controls and operates various lines of telegraph throughout the United States, and between the cities of New York and Buffalo, by means of which it transmits messages, news, reports and other divers forms of information; that the defendant the Gold and Stock Telegraph Company is a like domestic public service telegraph corporation, controlled by the Western Union Telegraph Company, and that all of the business of the Gold and Stock Telegraph Company is the business of the Western Union Telegraph Company; that the Western Union Telegraph Company is engaged in transmitting quotations and prices at which divers sales and purchases of bonds, stocks, and commodities have been made upon the various exchanges and boards of trades in the various cities throughout the United States and, among others, the purchases and sales of stocks and bonds upon the New York Stock Exchange, and that

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the Western Union Telegraph Company transmits the said quotations over its telegraph lines for the purpose of distributing the same to persons and corporations who subscribe for such service, and takes the compensation fixed therefor by it; and that it distributes such quotations to its various subscribers by means of a direct telegraph wire, referred to as the "fast wire," to the place of business of the subscriber, and also by means of "tickers" placed in such place of business, which said "tickers" are operated through the Western Union Telegraph Company; that the defendants have a fixed rate for such service in the city of Buffalo, N. Y., of thirty-five dollars per week for "fast wire" service, and the sum of six dollars per week for "ticker" service, and that said defendants are furnishing such service to a large number of subscribers in said city of Buffalo, N. Y.; that for a long time past the plaintiff has been and now is a subscriber for the New York Stock Exchange quotations, and that the defendants have furnished the plaintiff with said quotations, by means of said "fast wire" and "tickers," and that the plaintiff has, at all times, promptly paid the regular and fixed rate for said service, and, in all respects, complied with the reasonable rules and regulations of the defendants.

The complaint further alleges that notwithstanding that the plaintiff has paid to defendants in advance for said services and had complied with all reasonable rules and regulations of the defendants, and is willing to do so in the future, the defendants, without cause and without notice, and with intent to discriminate against the plaintiff, and to injure him in his business, has determined to cut off such service to the plaintiff; that the plaintiff has demanded a continuance of such service, and has informed the defendants that he is willing and financially able to pay the

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regular compensation therefor, and that he will comply with all reasonable rules and regulations of the defendants in relation to its use, but that the defendants unlawfully and wrongfully refuse, and have refused, to continue such service, although such service will be continued by defendants to divers and various other persons and subscribers in the city of Buffalo, and elsewhere in the state of New York and the United States.

The defendants aver that said quotations, particularly the quotations of purchases and sales of stock and bonds upon the New York Stock Exchange, are transmitted under and by virtue of the provisions of a written contract between the New York Stock Exchange and the defendant telegraph company.

They admit that subject to the provisions of said contract the Western Union Telegraph Company transmits said quotations and distributes same to such persons and corporations as subscribe for such service, and pay the compensation required therefor, under the conditions of the said contract under which the "tickers" are operated by the Western Union Telegraph Company, but deny that they are required to furnish such quotations by means of said ticker service, or otherwise than as set forth in said contract.

They admit that the rates of said "ticker" service and "fast wire" service for the quotations of the New York Stock Exchange are uniform and fixed, and that subscribers are entitled to receive the same under the provisions of said contract, and that the rate of said "fast wire" service in the city of Buffalo is thirty-five dollars per week, and that the rate for the "ticker" service is six dollars per week.

They admit that they have been furnishing such "ticker" service to a number of subscribers in the city of Buffalo, N. Y., and admit that the plaintiff has

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been a subscriber for the quotations of the New York Stock Exchange, and has been furnished by the defendant Western Union Telegraph Company with said quotations by means of said "ticker" service, and said "fast wire" service, and that the plaintiff has heretofore paid the fixed rates for said service, and has complied with the regulations of the defendant Western Union Telegraph Company, but deny, that without cause and without notice, and without intent to discriminate against the plaintiff, and to injure him in his business, they determine to cut off said "ticker" service, and deny all of the other allegations in the eighth paragraph of the plaintiff's complaint, save the allegation that said "ticker" service will be continued to other persons and subscribers in the city of Buffalo, N. Y., and elsewhere in the United States, under and subject to the provisions of the defendants' contract with the New York Stock Exchange. The defendants then set forth, at length, their several contracts with the New York Stock Exchange, and allege that by virtue of a contract now existing between the defendants and the New York Stock Exchange all applicants for continuous quotations of the New York Stock Exchange must be approved by the New York Stock Exchange before the Western Union Telegraph Company can furnish the quotations desired by said applicants.

It will be seen, therefore, that substantially all the facts alleged in the complaint are admitted, except the charge that the telegraph company wrongfully refuses to furnish the service; and the defendants allege in substance that they refuse the service because the stock exchange has not approved of plaintiff's application, and that the telegraph company is bound by its contract not to furnish the service to the plaintiffs.

The issues therefore narrow down to the proposi-

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tions, *first,* that the stock exchange has an absolute property right in the quotations collected and compiled by it; *second,* that under the contract of July 1, 1914, between the exchange and the telegraph company, the relation of sender and carrier of messages exists, and that to require the telegraph company to furnish these quotations to others than those approved by the stock exchange, would compel a violation of section 552 of the Penal Law.

As to the first proposition, that of an absolute property right in the quotations, there can be no doubt. *Christie Grain & Stock Co.* v. *Board of Trade of Chicago,* 198 U. S. 236; *Hunt* v. *New York Cotton Exchange,* 205 id. 322.

As to the second contention, that of the relation of sender and carrier, and of a violation of section 552 of the Penal Law, I cannot agree. Section 552 contemplates a person who wrongfully obtains or attempts to obtain any knowledge of a telegraphic message by connivance, with a clerk, operator, messenger or other employee of a telegraph company, or being such employee wilfully divulges the contents of a message. It is obvious that this has reference to messages as generally understood, and no doubt would apply to messages sent over private, direct wire or received privately from a ticker or other instrument.

But the service under discussion is distinct from the ordinary and commonly accepted duty of receiving and delivering messages, and is one which has grown up to meet the demands of business, the quick transmission of market conditions to all parts of the country. The value of the service is not in its secrecy, but in the publication of the information as soon as it is available. The office of a broker who has the service is practically a public one, and once the quotation is received it is practically open to any one who desires it.

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It cannot be said, therefore, that the Penal Law is violated by such publication. Publicity of the quotations is of the first importance. While trading at the exchange between members and their representative on the floor may be extensive, it is a matter of common knowledge that a very large part of the business comes from brokers at remote points, whose patrons are obliged to depend upon market conditions disclosed by those quotations of actual dealings on the floor. It is because of this service furnished at frequent intervals, that traders in distant cities are informed of the trend of the market and enabled to determine upon their action. The province of the exchange is that of affording facilities to buy and sell, and it is manifestly to its own interests that the buying and selling public know the market conditions. The nature of the business is such that operators prefer to deal with responsible brokers at their home cities rather than to attempt to trade with members of the exchange direct, and in order to do this they must have the information necessary to the determination of their orders. So this system has grown to its present proportions and requires the co-operation of the exchange, the telegraph company, and the brokers in furnishing to patrons the facilities required. In the nature of things, the business cannot be private and secret but must be public and instantly available to all. The question here presented is somewhat different from that involved in the sending and carrying of a message. The telegraph company is a corporation formed for the purpose of transmitting messages, and the statute under which it exists in this state requires it to perform this service with impartiality and good faith, aside from any requirements under the Public Service Commissions Law. The stock exchange is a voluntary association, having a private office to which none but members are

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admitted, and here they meet daily and buy and sell bonds, stocks, etc., as opportunity is given by means of oral offers and bids. The members of the exchange operate, not only on their own account, but as representatives or agents of persons not members, and located in all parts of the country. To facilitate the business, it became the practice to make note of the fluctuations in the bids and offers on the floor, and members were able to send this information to their customers wherever they might be, by messenger, by post, or by telegraph, the latter being the means principally used for obvious reasons. The evolution of the business resulted in the ticker, a machine, automatic in its essential features, and the telegraphic equipment was so improved and enlarged that any number of tickers could be operated at the same time, wherever located. The ticker is the property or under the control of the telegraph company. The growth of the business and the facility of communications caused the establishment in remote cities of offices where correspondents or customers of members of the exchange received immediate information by means of the ticker, and it became the practice to post the information on blackboards so that any person might be informed of transactions occurring on the floor of the exchange, practically as soon as known there. The business on the floor of the exchange by these facilities increased to large proportions, and was so productive that the exchange, instead of its business being confined to individual operations of its members, permitted employees of the telegraph company to come in upon the floor, make note of the transactions and transmit the information broadcast throughout the country. The new development in the brokers' offices resulted, and by contract with the telegraph company the brokers had tickers installed in their offices, giving to the public

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the quotations of all transactions on the floor of the exchange by means of which business could be done anywhere with practically the same facility as that of a person on the floor of the exchange. Assuming that the expense of obtaining this information was only the compensation of its employees who gathered it, the telegraph company profited by the rental or sale of the tickers and furnishing the quotations, and also in procuring the business of the return communications by wire between the brokers throughout the country, and the operators on the floor of the exchange. It soon became manifest that these quotations were valuable property which should yield a profit to the exchange. The telegraph company's employees were excluded from the floor, and the exchange itself, through its own employees, collected and collated the quotations and delivered them to the telegraph company for transmission to its customers who had tickers installed. The business is in no manner changed. The telegraph company receives the same quotations and distributes them in the same manner as before; the only difference is that now the exchange collects and collates them, and delivers them to the telegraph company.

It may be assumed that there is no restriction placed upon any member of the exchange as to the volume of his transactions on the floor, and it may also be assumed that no member would refuse to fill any legitimate offers of business. A broker, therefore, wherever located, would be able to arrange for the filling of his orders on the floor of the exchange. The more orders received, the greater volume of business and the greater income to the members of the exchange and to the telegraph company which furnished the information on which to deal, and the quick means

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of communication between the broker and the member on the floor.

If the elements of the business were all embraced in the matters above outlined, it might be urged that the brokers were the agents of the members of the exchange in procuring business and through arrangements definitely made the exchange, on behalf of the member sending to the brokers, by means of the telegraph company, private information to enable them to do business, the telegraph company would therefore be bound to deliver this information to the persons and to them only, whom the member or the exchange should designate; the messages would be like ordinary messages, subject to secrecy. Whether they were sent in the common yellow envelope or were transmitted through the means of the ticker would make no difference.

But this is not the situation presented by this case. If it were, the exchange would pay the telegraph company for every message so sent, at rates common to all, while the fact is the telegraph company pays the exchange a large sum, presumably not a gift, but a payment made for the purpose of acquiring something. If it were the business of sender and carrier, the exchange would seek the agents, assume the work and charge for installing the tickers, while the fact is, the telegraph company has the responsibility of securing the patrons, installing the equipment and collecting the cost.

If it were the ordinary business of transmitting messages the telegraph company would not pay the exchange, nor would it contract to do the business for a gross sum, because it is bound to charge uniform rates to all as the messages are presented for transmission. The information if received over the ticker and retained privately by the broker might properly

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be restricted. In the nature of things this would be of comparatively little value. A broker receiving quotations which he was bound not to publish would of necessity be obliged to do business with each individual customer, disclosing to him information required in the particular case. It is a matter of common knowledge that this is not and cannot be the method of doing business. The persons desiring to trade want all the information available and at once. It is not generally the case of an individual going to his broker's office intent upon buying or selling a predetermined commodity, as he would go to the market to buy his household supplies. It is rather that of a trader ascertaining general conditions, and by reason of his shrewdness, sizing up the business situation, availing himself of an opportunity to make a profit. The exchange does not criticize this publication by brokers doing a legitimate business.

The quotations are in no sense secret communications. They would be well nigh worthless to the trading public if kept secret. Their value is measured by the publicity given them. This is manifest from the fact that, immediately a transaction is made, it is quoted and transmitted to all having the tickers to receive it, and it in turn is immediately posted and published to the world. This is the means by which the broker, and through him the member of the exchange, obtain business. Now the telegraph company is the intermediary essential to the transaction of a great volume of business in the exchange. It could stand strictly upon its statutory duty to furnish impartial service in the transmission of all messages tendered. When the manifolding of the delivery by means of the ticker or any other device to facilitate the transmission became known, it could with propriety secure such devices and offer the same on equal

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terms to all patrons according to the nature and extent of the service required. If the exchange or its members desired to extend their business by establishing agencies in the cities outside of New York, it would be their concern and not that of the telegraph company. The telegraph company would have the right to refuse to transmit it except on the basis of ordinary messages or any other means whereby equal and impartial service was rendered.

It is deemed expedient, however, to enter into an arrangement whereby the exchange collects the quotations, delivers them to the telegraph company to be distributed to its patrons, and for this the telegraph company pays the exchange a large sum of money. No question is raised, although it might be, as to whether or not the telegraph company has not gone outside of its corporate powers in paying large sums of money for news to be transmitted broadcast, but, assuming that it is within its rights, it is urged that it cannot legally acquire property or rights in property to be utilized in such a way as to refuse equal facilities to all citizens.

It is part of the "service" which the telegraph company renders through its facilities and under its charter and which it must render with impartiality in good faith. *National Tel. Trans. Co.* v. *Western U. Tel. Co.*, 119 Fed. Rep. 294.

It seems to me clear that the service in question is not that of transmitting messages for hire, but that it is that of purchasing rights in information, made valuable, by its publication; and assuming that the telegraph company has the right to make such purchase, it has not the right to do so unless it has also the right to dispose of it on equal terms to all who may legally require it. But it appears that the information received and transmitted might be and probably

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has been used unlawfully, in gambling transactions and in so-called bucket shops where the transactions were not *bona fide,* and the exchange, desiring to prevent such transactions, determined to control the business to the extent of requiring the telegraph company to refuse the service to any one making unlawful or improper use of it. No criticism can be made of this action. It was and is the duty alike of the exchange and the telegraph company to so act. This appears from the record to be the only control that the exchange has ever claimed to exercise, once the quotations are delivered to the telegraph company, and it is specifically so stated in the contract. It is true that the contract also provides that the patrons of the telegraph company to receive the service must be approved by the exchange. But what is the purpose of the approval? Manifestly it is to meet the one objection, that of furnishing the service for unlawful or improper purposes. The exchange in the circumstances here shown cannot under this contract claim the right arbitrarily to deprive a broker doing a legitimate business of the facilities offered by the telegraph company, nor can it so restrict the telegraph company.

The plaintiffs here have for years had this service and paid for it, and are prepared to pay for it in the future, and to conform to all reasonable regulations. It is not claimed that they or either of them have ever used or contemplate using this service for unlawful or improper purposes, or otherwise than in accord with the regulations proposed.

The stock exchange has the right to refuse to give the quotations. The telegraph company may have the right to refuse to furnish the quotations to any one although it well may be contended that all its facilities are subject to public control, and that it might in the public interest be compelled to utilize them. But with

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the exchange giving the information to the telegraph company, knowing that it is to be delivered to various patrons, does it not thereby submit it to the control of the public through its Public Service Commissions Law? The telegraph company must conform to these regulations, giving equal and impartial service to all requiring it who conform to the legal requirements. It is apparent that a patron who violates any of the requirements may justly and legally be deprived of the service, but there is no intimation that either of these plaintiffs is charged with any violation, and it appears that for a number of years they have enjoyed this service, have conformed to its requirements, have paid for it, and are prepared to pay for it in the future.

The stock exchange and the telegraph company have the right to restrict the service to lawful and proper use, and it appears from the contract that it was intended to so restrict it; but to go further, and undertake to grant to one and refuse to another equally entitled, would constitute an unlawful discrimination. The contract provides: "11. It is understood and agreed that as to the right of the Exchange — to disapprove applicants for quotations — it is the intent only to prevent the unlawful and improper use of such quotations."

There being no claim that plaintiffs have made or will make any unlawful or improper use of the quotations, they cannot arbitrarily be refused the service so long as it is furnished to others in like business. The telegraph company is interested in this interpretation of the contract. It pays a large price for the quotations and can only make the service profitable by contracting with a large number of patrons. If the exchange has the power to restrict the use of the service by refusing those five patrons, it may refuse the service to all the patrons in Buffalo after the telegraph

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company had gone to the expense of extending its wires, and installing its instruments. It seems to me clear that, when by its contract the exchange says that "it is the intent only to prevent the unlawful and improper use of such quotations," it has reached its legal limit if the service is to be given at all, and the burden is upon it to show a violation of the terms and conditions if it undertakes to deprive a patron of the service.

It is true that the exchange has the right to refuse to disclose any of the information collected; and it has been held that it being private property it could limit its sale as it chose; but the information is sold for a substantial price to the telegraph company and becomes its property, subject to any legitimate restrictions. It could not, if it would, prevent its publication, once it is given to any broker and posted on the bulletin or blackboard. It is published to the world and if given to one there is no good reason why any other, doing a lawful business, should be precluded from receiving it on equal terms. The quotations being valuable property and subject to sale, the ordinary rules regarding property apply. The title passes from the exchange upon delivery and becomes vested in the telegraph company, and the telegraph company sends the quotations broadcast to brokers who immediately publish them to the world. They are beyond the control of the exchange immediately upon delivery to the telegraph company. It is true that the word "sale" is not used in the contract, but all the elements of a sale are present, delivery of valuable property, and the payment of the consideration price. There is nothing peculiarly secret or sacred in these quotations, and there is no substantial reason why they should be treated differently than any other kind of personal property. The exchange might retain control by con-

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tracting directly with the brokers and then would be entitled to limit the number of its agents. The quotations would be sent through the telegraph company by the same means as now, but there would be no reason why the telegraph company should pay anything; on the contrary the telegraph company would be relieved of the payment of the sum now agreed to be paid and would receive full legal compensation for services rendered. The defendant contends that its position is sustained. *Matter of Renville*, 46 App. Div. 37.

In that case the court refused a mandamus to compel the telegraph company to furnish petitioner with quotations of the exchange in the same manner as furnished to others. This decision was made in 1899, before telegraph companies were brought within the Public Service Commissions Law. It does not appear that the applicant in that case conformed to the reasonable rules and regulations, nor that the respondents were not acting within their rights in refusing the service.

Under the Public Service Commissions Law these defendants are prohibited from charging, collecting or receiving a different compensation for any service rendered than the charge applicable to such service as specified in its schedule on file and in effect, and from refunding or remitting directly or indirectly any portion of the rate or charge so specified. Art. 5, § 92.

The law also provides that every telegraph corporation shall print and file schedules showing "all rates, rentals, and charges per service of each and every kind."

The conclusion reached here does not conflict with the law of the *Renville* case applied under then existing conditions. It appears in that case (p. 43) that "this private voluntary association (The Exchange) being thus in control of its own property, and having

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the absolute right to give information as to the dealings of its members with each other to whom it pleases, and upon such conditions as it pleases to impose, gives certain information to the defendants to be delivered to certain specified persons, and upon condition that the defendants give such information to such specified individuals and none other."

It appears that by the agreement between the exchange and the telegraph company then in force, the telegraph company has the right (p. 41) "to serve said reports to — all persons, firms, corporations and organizations in New York City and elsewhere — except to persons who may be directly or indirectly engaged in the promotion or maintenance of 'bucket shops.'"

It thus appears that the purpose of the restrictions was to prevent the furnishing of quotations to bucket shops; that the exchange retained control of its own property, and specified the person to whom it should be delivered. It would seem that it would be nearer correct if it stated the persons to whom it should not be delivered. In the present case the exchange does not specify any persons whatever. It delivers the property for value to the telegraph company with the only legal restriction that the telegraph company shall not specify any persons engaged in promoting bucket shops. The telegraph company has specified those plaintiffs, who are entitled to the presumption that they are not in the prohibited class, and moreover it is alleged and not controverted that they are not in the business of promoting bucket shops.

The provisions of the Public Service Commissions Law are analogous to the Interstate Commerce Act, and decisions under the latter are instructive.

In *L. & N. R. R. Co.* v. *Motley*, 219 U. S. 467, the railroad company, an interstate carrier, contracted

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with Motley that in consideration of a release of a claim for damages it would issue annual passes for life to Motley and his wife. Subsequently the Interstate Commerce Act was passed prohibiting different compensation for transportation than that specified in its published tariffs or rates, and the railroad company refused to furnish the passes. The court held that while the contract for the passes was valid when made by subsequent legislation such contract was unenforcible; so here, if a pre-existing contract valid when made, is rendered unenforcible by legislation, a contract to restrict the performance of the requirements of equal service is also unenforcible, and the quotations once they are delivered to the telegraph company are subject to the rule of equal service to all who conform to the reasonable regulations and pay the uniform charges.

It is urged by defendants that if plaintiffs have any right or complaint their remedy is by application to the public service commissions under section 97 of the law, but the citizen whose private rights, capable of enforcement in the courts are involved, is not confined to an application to the commission, when in the meantime his business is greatly if not totally interfered with, and the relief by injunction is the only remedy adequate to the situation. The injunctions are continued until the hearing and determination of the actions.

Ordered accordingly.

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JOSEFA FORYCIARZ, Plaintiff, v. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Defendant.

(Supreme Court, Erie Trial Term, May, 1916.)

Insurance (life) — assignment of policy when good — estoppel — actions — validity of policy — contracts.

An assignment of an industrial policy of insurance by a married woman to one who advanced money so that the assignor and her family could go back to their old home in Austria is good as against the insured, and her husband having shared in the benefits of the proceeds of the assignment is estopped from disputing its validity.

In this state the assignment of a policy of life insurance though to one not having any insurable interest in the life of the insured is good.

If a volunteer furnishes money in an emergency to one whose life is insured and takes no assignment of the policy he cannot maintain an action thereon to recover benefits thereunder.

Where the policy provided that it should be void if assigned or otherwise parted with and that the insurer might make any payment to any relative by blood or connection by marriage of the insured or to any other person appearing to be equitably entitled by reason of having incurred expense on behalf of the insured, the assignment in question was within the contemplation of the parties and upon the death of the insured the assignee was entitled to the proceeds of the policy.

Though agents of life insurance companies may neither waive nor alter the clear recitals or provisions contained in the policy, their acts and representations may help in showing the company's interpretation of the policy.

Where in an action upon the policy defendant pleaded that by its provisions the assignment thereof to plaintiff was avoided, the act of defendant in sending on checks payable to plaintiff while not a waiver or amounting to an estoppel might be considered in determining how defendant interpreted the policy, with all the facts before it.

Defendant having recognized the validity of the policy by accepting proofs of the death of the insured without objection,

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and attempting to make payment to the assignee of the policy and by making or attempting to make payment to the public administrator was not in a position to attack the assignment as the only way to destroy its validity was to declare the policy void under the provision prohibiting its assignment.

All the conditions and provisions of a life insurance contract which are favorable to the insurer are to be strictly construed and if reasonably susceptible of two constructions the ambiguity will be resolved in favor of the insured.

MOTION by defendant to set aside the verdict of a jury in favor of plaintiff rendered upon the direction of the court, and for a dismissal of the plaintiff's complaint on the merits.

Goldring & Sherman, for plaintiff.

Roland Crangle, for defendant.

DAVIS, ROWLAND L., J. On February 13, 1911, the defendant issued a policy of insurance for $204 upon the life of one Regina Nec, a young Austrian woman living with her husband in Buffalo. It was what is known as an "industrial policy," the premium of ten cents being payable weekly.

The printed form of the policy makes the "amount of benefit" payable to the executors or administrators of the insured, unless payment is made by the company to a relative or certain other persons "equitably entitled to the same by reason of having incurred expense on behalf of the insured."

The insured could neither read nor write. Her husband was a laborer; and after a child was born to them it was decided that they would go back to Austria, probably for a visit. To raise the money to go, the insured assigned her policy to her friend, the plaintiff, who bought for the insured, her husband and child transportation to their former home. They were

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advised by the agent of the company that this assignment was permissible; and there was some evidence that this instruction was given by the superintendents of the company to agents, and was communicated to prospective insurers when they were solicited to take out these policies. The testimony taken by the stenographer has not been furnished on this motion, and I am stating the evidence from my own minutes taken on the trial, and from memory.

After receiving the assignment, plaintiff paid the premiums for several months, until or after the death of the insured, which occurred at her old home in Austria. The husband and child apparently have remained in that country.

The plaintiff duly filed with the company proof of the death of the insured, made out on the form furnished by the defendant; this was accompanied by the written assignment of the policy to plaintiff. The company shortly afterward, with full knowledge of the facts, audited the claim and forwarded checks to one of its superintendents in Buffalo, to be delivered to the plaintiff. The policy was stamped "paid." The checks were not delivered to the plaintiff by the superintendent.

After a long interval the checks were returned by the superintendent to the company and eventually a check was drawn and sent on by the company payable to the public administrator, before a claim for the sum payable by the terms of the policy was made by him. The husband and next of kin of the insured did not reside in Buffalo, and were making no claim, and it may be that the act of the public administrator in making a claim was inspired by some over-officious local superintendent of the defendant. The checks were delivered to the public administrator and no effort was made by the defendant to compensate the plaintiff in

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any way, either for the money she had advanced when she took the assignment, or for the premiums she had paid.

From the statement of facts it may readily be seen that the merits are entirely with the plaintiff. She had advanced the money so the insured and her family could go back to their old home, where the former died and was buried. The assignment is good as against the insured. *Kimball* v. *Lester,* 43 App. Div. 27; *Spencer* v. *Myers,* 150 N. Y. 269.

The husband is the person who would be entitled to claim practically all the funds in the hands of the public administrator (Code Civ. Pro., § 2670; Decedent Estate Law, §§ 98, 100), and he having shared in the benefit would be estopped from disputing the validity of the assignment. There is no evidence that there were any debts of the insured, so that the public administrator would have no method of distributing the assets of this estate which the defendant has thrust upon him. Had the plaintiff not kept up the premiums, the policy would have lapsed and there would be no assets.

The principal defense to this action is, that by its terms the policy could not be assigned.

Article 3 of "provisions" is in part as follows: "Policy. When Void.—This policy shall be void * * * if the policy be assigned or otherwise parted with."

Ordinarily a policy of life insurance is assignable like any chose in action. *St. John* v. *American Mutual Life Ins. Co.,* 13 N. Y. 31; *Olmsted* v. *Keyes,* 85 id. 593; *Cannon* v. *Northwestern Mutual Life Ins. Co.,* 29 Hun, 470. In this state it may even be legally assigned to one not having an insurable interest in the life of the insured. *Steinback* v. *Diepenbrock,* 158 N. Y. 24. So that when the insured made the assignment to the

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plaintiff, the parties were exercising recognized legal rights unless the terms of the policy positively and explicitly forbade it.

The policy is payable "unto the executors or administrators of the insured unless settlement shall be made as provided in article 2 under the head of 'provisions' below, immediately upon receipt of due proof of the death of the insured during the continuance of this policy." Article 2 of the "provisions" referred to is as follows: "Facility of Payment.—The company may make any payment provided for in this policy to any relative by blood or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, for his or her burial, or if the insured be more than fifteen years of age at the date of this policy, for any other purpose, and the production by the company of a receipt signed by any or either of said persons or of other sufficient proof of such payment to any or either of them, shall be conclusive evidence that such benefits have been paid to the person or persons entitled thereto, and that all claims under this policy have been fully satisfied."

These industrial policies are for small amounts and have small weekly premiums. They are sold usually to laboring people of small means. One great purpose of the "facility of payment" provision must be to afford a ready method of raising money for the benefit of the insured, to pay funeral expenses at the time of death or to furnish medical assistance or some other relief in the last illness; or to have the policy an asset in the hands of the insured in any emergency in life, so that funds for something other than ordinary purposes may be provided. It is also of advantage that a payment may be made to a person other than

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the administrator or executor; in cases where there is no estate except the policy, the delay and expense incident to the appointment of such officers may be avoided. We may readily see that these would be strong arguments to be used by agents in selling this kind of insurance to this class of customers; and we find these arguments were used among the people where the insured resided.

Under the terms of the policy there are several possible payees. *First,* the executor or administrator; *second,* any relative by blood or connection by marriage; *third,* any other person equitably entitled to the same by having incurred expense for her burial, or, if the insured is more than fifteen years of age, for any other purpose.

Who is entitled to select the beneficiary? Always it is the insured so long as the selection falls within any permissible class. The company should have no right to select a beneficiary, particularly if it contravenes the expressed wish of the insured. The option contained in the policy should be exercised by the company only where the insured has failed to make a choice.

The company gives the insured a permissible list of payees; it furnishes a policy of insurance which it claims may be of value to pay funeral expenses, or an asset in the hands of the insured when an emergency arises. How does it expect the insured to utilize these privileges? If a volunteer furnishes money in an emergency and has no assignment, he cannot maintain an action to recover the benefits under the policy. *Ferretti* v. *Prudential Ins. Co.,* 49 Misc. Rep. 489; *Margulli* v. *Metropolitan Life Ins. Co.,* 79 N. J. Law, 271. The only way for the insured to avail herself of the benefit of the policy, under the circumstances, was to assign it, and give to her friend who had advanced

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money some assurance of remuneration. Otherwise, the latter's opportunity for being reimbursed would depend entirely upon the caprice of the company or of some superintendent. By assignment the insured may prevent the payment to a claimant who is unworthy. It cannot seriously be contended that it would be wise to give such an arbitrary power to select the beneficiary to the insurer, and deny a right of choice to the insured. That would furnish opportunity for corruption and improper conduct by unscrupulous agents and superintendents. *Shea* v. *U. S. Industrial Ins. Co.*, 23 App. Div. 53. To do so would be to make valueless, to a large extent, the opportunity given by the terms of the policy to the insured to provide money at a time of illness or approaching death; it would defeat the manifest purpose of the provision in question and make it extremely hazardous for any friend to furnish money to the insured in any necessity, in reliance upon the chances of repayment from the only asset the insured might have.

The plaintiff falls within the class of persons "equitably entitled to payment" under the terms of the policy. In other words, she is one of the very persons contemplated as payees when the company issued this policy. The insured selected her as beneficiary by making the assignment.

An assignment must have been within the contemplation of the parties when the policy was issued. When the company attempted to restrict the assignment of the policy, in article 3 as above quoted, it must be assumed it did so only as to persons not having an insurable interest, or who did not fall within the classes of permissible payees, and to prevent advantage being taken of rightful beneficiaries by claimants who were imposters and without merit. But to hold that the policy was not assignable under the circum-

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stances recited, would be to subtract much from the value of the policy to the insured, and to render nugatory the purpose of the provisions of the policy permitting the insured to raise money in an emergency.

The plaintiff has recognized that these policies are assignable by its conduct. Agents cannot waive or alter the clear recitals or provisions contained in policies. *Gorman* v. *Metropolitan Life Ins. Co.*, 158 App. Div. 682; *Legnard* v. *Standard Life & Accident Ins. Co.*, 81 id. 320; *Elsner* v. *Prudential Ins. Co.*, 13 Misc. Rep. 395. But their acts and representations may help in showing the company's interpretation of the policies. *Shea* v. *United States Industrial Ins. Co.*, 23 App. Div. 53. There is some evidence that agents with the knowledge of the superintendents were representing that such policies could be used as an asset in times of need.

The company gave recognition to valid assignments when it furnished a blank for proof of death which has a heading "Information to be furnished where claimant is other than father or mother, brother or sister, husband or wife." We find in line four of the blank in question, "Has claimant a beneficiary form or *assignment* of any kind?" The next line reads: "If so attach the same to the claim papers." The claimant answered the question "Yes" and attached the assignment. The defendant then made out and sent on its checks payable to the plaintiff. What does the defendant mean by asking for the assignment? If it regarded the policy as nonassignable, it would not make such an inquiry. The company's act in sending on checks payable to the insured, while not a waiver or amounting to estoppel, may be considered in determining how the defendant itself interpreted the policy with all the facts before it.

In the provision prohibiting assignments, it is stated

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that the *policy* is void "if the policy be assigned or otherwise parted with." The defendant does not here seek to declare the policy void. It seeks only to declare the assignment void. The company has recognized the validity of the policy by accepting proofs without objection and attempting to make payment to the plaintiff, and by making payment or attempting to make payment to the public administrator. It has no power to declare an *assignment* void. The only way to destroy the validity of an assignment under the terms of the policy was to declare the policy itself void.

The language of the policy being that of the company, all the conditions and provisions favorable to the company are to be strictly construed; and if the policy is reasonably susceptible of two constructions, the ambiguity is to be resolved in favor of the insurer. 25 Cyc. 739.

In *Columbia Bank* v. *Equitable Life Assur. Soc.*, 61 App. Div. 594, Patterson, J., says: "It is manifestly the duty of the insurance company to pay the amount due upon the policy to the real owner of it, or to whomsoever may have acquired a paramount lien upon it or money payable under it according to its terms."

Applying that doctrine to the facts here, we find that the plaintiff is entitled to receive payment.

In *Heffernan* v. *Prudential Insurance Co.*, 88 Misc. Rep. 93, where in an action on a similar policy the Appellate Term held that the plaintiff's complaint should have been dismissed, different questions were presented, and the facts were apparently entirely different from those disclosed here.

In reaching the conclusion that I have, I have not regarded it necessary to discuss one significant memorandum made apparently in the office of the company on the face of the form of the proof of death. This

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comes under the head of "synopsis of claim department examination." The memorandum is as follows: "Draw two checks, one for $104.00 to be endorsed and returned, and one for the balance to claimant." A legitimate inquiry might perhaps be made as to why the larger check was to be indorsed by the claimant and returned to the company. Was the company, under its alleged option, selecting itself as the principal beneficiary?

The motion to set aside the verdict and for a dismissal of the complaint must be denied, and the plaintiff may enter judgment.

Motion denied.

JULIA B. HALL, Plaintiff, *v.* ARTHUR V. DAVIS and One, as Executors of the Estate of CHARLES M. HALL, Deceased, Defendants.

(Supreme Court, Niagara Trial Term, May, 1916.)

Conversion — of corporate stock pledged as collateral security for loan — corporations — damages — evidence.

Where a transaction constitutes a pledge of corporate stock as collateral security no stamps as required by sections 270–279 of the Tax Law need be affixed to the stock certificate, but if the stock was sold outright the omission to affix the stamps constitutes an evasion and violation of the statute, and in an action to recover damages for the conversion of corporate stock, which plaintiff claims was pledged as security for a loan but which defendants claim was sold outright, evidence is admissible to show whether there was a sale of the stock or whether it was pledged, no stamps being affixed to the stock certificates when offered in evidence and no proof offered that the tax on the transfer had been paid.

If the transaction were in fact a sale failure to affix the stamps as required by statute did not render the sale invalid.

Evidence in an action against the executors of plaintiff's

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brother for the alleged conversion of certain shares of stock claimed by her considered, and held to show title thereto in defendants by reason of plaintiff's sale of the stock to her brother in his lifetime.

ACTION for conversion.

Charles Hickey, for plaintiff.

Cohn, Chormann & Franchot (Morris Cohn and Edward E. Franchot, of counsel), for defendants.

TAYLOR, J. This is an action for $100,000 damages, the plaintiff claiming that the defendants have converted to their own use 200 shares of the stock of the Aluminum Company of America belonging to the plaintiff. The parties have stipulated to try the case before the court without a jury.

The plaintiff is a sister of the defendants' testator, who died in December, 1914. Her contention is that on August 1, 1911, she was the owner of certificates Nos. 460 and 461 of the stock of said company and that on that day she borrowed $12,500 from her brother and deposited with him certificate No. 460 as collateral security; and that on February 1, 1912, she borrowed an additional sum of $12,500 from her brother and deposited with him certificate No. 461 likewise as collateral security. She claims that these loans were cancelled and discharged by her brother's last will and testament and that thereupon she became entitled to the unconditional return of her stock. Prior to the commencement of the action and on September 14, 1915, the plaintiff demanded of the defendants the return of said certificates, which was refused. No promissory note or other evidence of indebtedness was executed. The certificates indorsed in blank by the plaintiff were in her brother's possession at the time of his

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death. The dividends were paid to the plaintiff and by her turned over to her brother during his lifetime and afterward to the defendants until the month of February, 1915, when the defendants caused the certificates to be placed in their own names upon the books of the company.

The defendants contend that the transactions of August 1, 1911, and February 1, 1912, constituted a sale outright of the stock by the plaintiff to her brother for which he paid her the full purchase price of $25,000. All evidence of such sale or tending to prove a sale was objected to by the plaintiff. Inasmuch as the action was tried by the court without a jury, the evidence was admitted over the objection and exception of the plaintiff but subject to being later stricken out if the court should hold that it was inadmissible.

No stamps, as required by article XII of the Tax Law (Consol. Laws, chap. 62), had been affixed to the stock certificates when they were offered in evidence and no proof was offered that such tax had been paid. If the transaction constituted a pledge of the stock as collateral security for a loan, no stamps were required; but if, on the other hand, the stock was sold outright, as the defendants claim, the omission by the plaintiff to affix the stamps constituted an evasion and violation of the statute.

The basis of the plaintiff's objection to the admissibility of the testimony tending to prove a sale is section 278 of the Tax Law which reads as follows:

"Effect of failure to pay tax. No transfer of stock made after June 1, 1905, on which a tax is imposed by this article, and which tax is not paid at the time of such transfer, shall be made the basis of any action or legal proceedings, nor shall proof thereof be offered or received in evidence in any court in this state."

The plaintiff contends that this statute could have

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only one meaning and that under no circumstances may proof of a sale be offered where the tax has not been paid at the time of transfer. Such a construction, it seems to me, would clearly nullify other important provisions of this law. To illustrate: Section 272 of the act provides that any person who shall make a sale or transfer of stock without paying the tax shall be deemed guilty of a misdemeanor and upon conviction thereof shall pay a fine of not less than $500 or more than $1,000, etc. Assume a defendant on trial charged with a violation of this section. The stock certificate is produced, on which no stamp appears. The defendant's attorney thereupon objects to any evidence of a sale upon the ground that a transaction cannot be made the basis of any legal proceeding and that all evidence of such sale is inadmissible under the statute. The district attorney would, of course, be unable to convict without proof of a sale. It would, therefore, seem to follow that this important provision of the law providing punishment for the commission of crime would be entirely nullified if such transfer could not under any circumstances be made the basis of a legal proceeding and proof thereof be received in evidence.

The same argument applies to section 277 which provides that any person who shall violate the statute shall, in addition to the other punishment provided, forfeit to the people of the state a civil penalty of $500 for each violation. For how could the state recover the penalty unless it can prove the sale? And how can it prove the sale if the legislature forbids such proof under section 278? The result of such a construction would be to nullify the entire Stock Transfer Law. The payment of the tax would be generally evaded because the state had failed to provide effectual means for its enforcement.

It would seem, therefore, that the legislature did not

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intend that evidence of a sale should under all circumstances be inadmissible where the tax is not paid. It becomes, then, the duty of the court to construe the law in the light of what the legislature really intended. Obviously to me the purpose of the section was to deny to an offender who violates its provisions the right to enforce through the courts a contract which he by his own inadvertence or wrong has made unenforceable. *Sheridan* v. *Tucker,* 145 App. Div. 147.

If anybody has violated the statute in this case it is the plaintiff and not the defendants' testator, for if the transaction was a sale it was the plain duty of the plaintiff, and of no one else, to affix the stamps at the time of the transfer. In no event has the defendants' testator been guilty of any omission of duty. Whether the transaction is to be treated as a pledge or a sale, therefore, the statute was not intended to include it and the evidence was admissible.

If the transaction was in point of fact a sale the plaintiff has been guilty of an omission of duty and of course cannot be permitted to profit by the same to the detriment of the defendants. To me it seems impossible that our legislature could have intended that in an action like this, wherein a plaintiff claims a pledge and a conversion of stock, this statute was intended to prevent the defendants from pleading and proving that the transaction was really a sale. An interpretation so unfair and inequitable and so devoid of basic warrant in this aspect of the statute should not be made by a court unless its necessity be clearly apparent.

The plaintiff insists that even if the transaction was in point of fact a sale there would still be no forfeiture; that the defendants could bring an action on the theory that there had been no valid sale and in such action recover back the stock or its value. But the sale is valid and the failure to affix the stamps did not render

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it invalid. *Bean* v. *Flint,* 204 N. Y. 153. The plaintiff urges that the defendants could bring an action for money had and received, alleging a total failure of consideration. But the defendants should not be required to adopt a theory which they reject; on the contrary, for the reasons I have given, the defendants should be permitted to contend that the transfer was a sale, that being their view of it.

I hold, therefore, that the evidence of the sale of this stock by the plaintiff to the defendants' testator is properly in the case. That evidence consisted largely, if not principally, of letters written by the plaintiff in which she characterized the transactions as sales. Furthermore, although it is not a matter of prime importance, I feel that the provisions of the will of Charles M. Hall under which the plaintiff claims that any indebtedness of hers to Charles M. Hall on account of the transaction in question has been cancelled do not assist the plaintiff; for in addition to the direction in the will that: "all indebtedness of any of my relatives to me shall be cancelled and discharged," the will specifies indebtedness "evidenced by any notes or other form of indebtedness," and the will further specifically states that the testator does not make "any bequest or devise to my sisters, Edith M. Hall, Julia B. Hall and Louie A. Hall, for the reason that they are already abundantly provided for," etc.

Therefore, since it further appears to me that the weight of the evidence, instead of being in the plaintiff's favor, is clearly to the effect that the defendants are the true owners of the stock in question, I find that the complaint must be dismissed, with costs.

Judgment accordingly.

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JOHN CHARLTON, Plaintiff, v. CHRISTOPHER J. SHEIL, Defendant.

(Supreme Court, Monroe Equity Term, May, 1916.)

Specific performance — when not entitled to decree of — in action to remove cloud on title — deeds — contracts.

A written instrument, drawn by defendant who was not a lawyer, whereby he offered to give plaintiff $25,000 for his farm, provided for the payment of $100 down and "six months after or before" $9,900 of the purchase price and for a mortgage for the balance of $15,000 to plaintiff who was to give a warranty deed, was signed by both parties and $100 paid to plaintiff. In an action to remove a cloud on the title, held, in accordance with the practical construction of the parties, that the agreement could not be construed otherwise than that when the $9,900 was paid and the mortgage given the deed was to be delivered, and when on the day that sum was to be paid plaintiff tendered to defendant a properly executed deed of the premises and notified defendant, who refused to pay, that the agreement was terminated and also refused to grant any extension of time, plaintiff was entitled to maintain an action for the cancellation of the agreement which was recorded in the county clerk's office by defendant nearly two months after his default in making payment of the $9,900.

Whether the agreement was to be regarded either as a land contract or a mere option to purchase it must be held, in view of plaintiff's inquiry of defendant before the day the $9,900 was to be paid whether or not he expected to fulfill his agreement, that time was of the essence of the agreement but if under the terms thereof the matter was in doubt the action of the parties clearly made it so, for when plaintiff refused defendant's request for an extension of payment for an indefinite time they then and there made time of the essence of the transaction.

It would be a manifest injustice to plaintiff to hold him indefinitely under an agreement to sell the farm when so small a payment had been made upon property which was increasing in value, when defendant defaulted in his first substantial payment and gave no reasonable encouragement as to when any

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future payment would be made, and, therefore, in the circumstances defendant was not entitled to a decree of specific performance of the agreement which he alone had violated.

ACTION to remove cloud on title to real property.

Andrew E. Tuck, for plaintiff.

George Fort Slocum, for defendant.

CLARK, J. Plaintiff brings this action for the cancellation of a certain instrument dated May 21, 1914, whereby defendant offered to give to plaintiff $25,000 for his farm located partly in the city of Rochester, and partly in the town of Brighton, Monroe county, containing 100 acres of land, which instrument provided that defendant would pay $100 down upon plaintiff's accepting the offer, and "*six months after or before* pay $9,900.00 of the purchase price, and also give a mortgage for the balance of $15,000.00 payable in ten years, or before, with interest at 5% per annum." The instrument also provided that plaintiff was to furnish a warranty deed, good title, tax searches, etc. Both parties signed the instrument and defendant paid to plaintiff $100.

The time for the payment of the $9,900 expired, according to the terms of this instrument, on the 21st day of November, 1914. Defendant did not make the payment, and offered as an excuse for such failure that owing to the European war there had arisen an unexpected stringency in the money market.

At least two or three times between the date of the instrument and the 21st day of November, 1914, when the $9,900 was to be paid, plaintiff informed defendant that he desired to know whether defendant would perform his part of the contract, and pay this money on or before the 21st day of November, 1914, because

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portions of this land were used for raising nursery stock, and plaintiff wanted to know whether or not defendant would make the payments, so he could make preparations for fall planting of nursery stock, in case the plan fell through. Defendant made no reply to these inquiries, and especially to a letter which plaintiff wrote to him November 1, 1914, asking him, in substance, whether or not he was going to make the payments.

On the 21st day of November, 1914, which was the last day stated in the instrument in question for the payment of the $9,900, defendant and his counsel saw plaintiff, and requested further time within which to make the payment, which was due that day. Plaintiff asked defendant how long a time he would want, and defendant, or his attorney, replied that they could not tell, but they would get the money as soon as possible, but did not fix any time within which he would make the payment.

Plaintiff refused to grant any extension of time. He had on several occasions inquired of defendant if he was going to fulfill his agreement and make the payment by November twenty-first, and had received no reply. The latter knew ever since the instrument had been made that not later than November 21, 1914, he must pay the $9,900, and not until the last day had he asked for any extension of time. Plaintiff not receiving any reply to his inquiries as to whether or not defendant would make his payment, and receiving no promise or agreement as to any definite time when defendant would make the payment, went on and planted nursery stock on portions of the land in question, as he had a right to do.

On the 19th of January, 1915, and nearly two months after the time provided for in the instrument in question for the payment of the $9,900, defendant recorded

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it in the Monroe county clerk's office, and not until the 20th day of May, 1915, within one day of six months after his failure to perform on the 21st day of November, 1915, and more than three weeks after this action had been begun, defendant tendered to plaintiff $10,400, being the amount of the payment which should have been made November 21, 1914, with interest, and a bond and mortgage for $15,000, running to plaintiff, covering the property in question, and a deed, which he asked plaintiff to execute. Plaintiff refused to accept the money, or the bond and mortgage, or to execute the deed, claiming that defendant having failed to comply with the terms of the agreement on his part to be kept and performed, he was in default, and plaintiff was not obliged to carry out the agreement.

It is the contention of the plaintiff that the instrument in question was a mere option. Defendant's contention is that it is a land contract, and on its execution he became the equitable owner of the property in question, subject to plaintiff's lien for the balance of the unpaid purchase price of the property.

Whether the instrument in question is an option or land contract, I am satisfied that under the evidence in this case, and in view of the use made of this property, which was well known to defendant, portions of it being used for the planting and raising of nursery stock, and in view of plaintiff's frequent inquiry of defendant before November 21, 1914, whether or not he expected to fulfill the agreement, to which inquiries defendant made no reply, it must be held that time was of the essence of the agreement, but if there was any doubt about it, under the terms of the instrument itself, the actions of the parties clearly made it so, for when plaintiff refused defendant's request for an extension of payment to an indefinite time, they then and there made time of the essence of the transaction.

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When plaintiff had asked defendant several times if he intended to fulfill his agreement and make the payment November 21, 1914, one of said inquiries being by letter dated November 1, 1914, he was at least entitled to some sort of a reply, and defendant was not quite fair in refusing to give it. Moreover, he would be in better light in a court of equity in asking for specific performance of this agreement after his own default, if at the time the payment was due, and he failed to make it, but asked for an extension of time, he had given plaintiff any sort of an idea when the payment would be made.

When he asked for an extension plaintiff did not at first refuse it, but asked how long a time he wanted, or when he would be able to make the payment, or that in substance, and defendant replied in a most unsatisfactory way, saying that he could not tell how long, but that he would get the money as soon as possible. That really meant nothing to the plaintiff, and it would be most unreasonable and inequitable to expect plaintiff to hold his property and stand ready to convey it to defendant at any time when the latter could not or would not give him any sort of assurance as to when the payment would be made.

Much stress is laid by defendant on the fact that the instrument itself does not state the precise date on which the deed was to be delivered. The instrument was made May 21, 1914. It provided for the payment of $100 down, and "six months after or before" $9,900 of the purchase price was to be paid, and then a mortgage for the balance of $15,000 was to be given back to plaintiff, and it said "you (plaintiff) to furnish warranty deed," etc. That plainly meant that at the latest, that is, the last day of the six months, the $9,900 was to be paid and at that time the deed was to be deliv-

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ered and the mortgage given back for the balance of the purchase price.

The instrument was not drawn by a lawyer, but by the defendant, and no other construction can properly be spelled out of the language used, than that when the $9,900 was paid and the mortgage given for the balance of the purchase price the deed was to be delivered. The practical construction placed on the instrument by the parties themselves justifies this interpretation, for on that very day plaintiff prepared, executed and tendered to defendant a deed of the premises and demanded his money, which defendant refused to pay for the reasons above stated, and then plaintiff plainly notified him that the agreement was terminated, and in view of the circumstances established here it must be held that what he told defendant at that time, together with the correspondence and inquiries between the parties prior to that time as to whether or not defendant would make the payment when due, to which inquiries he made no reply, taken together, constituted a sufficient notice to defendant that upon his failure to live up to his part of the agreement the plaintiff regarded the incident as closed.

It will be noticed that when this agreement was made the payment made by defendant was not a substantial one. His offer to purchase the farm for $25,000 was in pursuance of a venture to speculate in this property by dividing it up into city lots and selling them. It would be a manifest injustice to plaintiff to say that defendant could hold him indefinitely under an agreement to sell this farm when so small a payment had been made, when the property was advancing in value, when defendant defaulted in his first substantial payment and gave no reasonable encouragement as to when any future payment would be made.

Under these circumstances defendant is not entitled

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to specific performance for he was the only one who failed to live up to the terms of his agreement. Plaintiff was ready and willing to perform. Defendant was not, and having failed to answer plaintiff's inquiries as to whether or not he would make the payment due in November, 1914, and having failed to make that payment or give any time when the payment would be made, is not entitled to specific performance of an agreement that he alone violated. 36 Cyc. 726; *Schmidt* v. *Reed,* 132 N. Y. 108; *Groesbeck* v. *Morgan,* 206 id. 385; *Babcock* v. *Emrich,* 64 How. Pr. 435; *Dwork* v. *Weinberg,* 120 App. Div. 507; *Darrow* v. *Bush,* 45 id. 262; Pomeroy Spec. Perf., § 407.

Nearly two months after his default defendant placed this instrument on record in Monroe county clerk's office, and while it stands on the record it would embarrass plaintiff if he should desire to dispose of his property, and he can maintain an action to remove this apparent cloud on his title. *Stokes* v. *Houghton,* 16 App. Div. 381; Code Civ. Pro., §§ 1638, 1639.

Under the circumstances specific performance must be denied the defendant, and plaintiff is entitled to be relieved from the cloud on his title.

Judgment is, therefore, directed in favor of plaintiff for the relief demanded in the complaint, with costs to be taxed.

Judgment for plaintiff, with costs.

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GEORGE NOBLE, Plaintiff, v. WILLIAM HIGGINS and CHARLES HIGGINS, Defendants.

(Supreme Court, Otsego Trial and Special Term, May, 1916.)

Penalties — action to recover penalty — refusal of service in restaurant on purely personal grounds.

Where one is refused service in a restaurant on purely personal grounds and not on account of race, creed or color, he has no right of action to recover a penalty under the Civil Rights Law as amended by chapter 265 of the Laws of 1913.

MOTION to set aside the verdict in favor of the plaintiff, rendered by a jury on the direction of the court, and for a dismissal of the plaintiff's complaint.

John G. Johnson (A. L. Kellogg, of counsel), for the motion.

William L. Hilzinger (Edson A. Hayward), of counsel), opposed.

DAVIS, ROWLAND L., J. On December 10, 1915, the plaintiff entered the restaurant of the defendants in the city of Oneonta and asked to be served with certain food, offering at the same time to pay therefor. His request was refused and he was ordered to leave the premises. The plaintiff commenced an action to recover from the defendants a penalty pursuant to the provisions of chapter 6 of the Consolidated Laws, known as the Civil Rights Law, as amended by chapter 265 of the Laws of 1913.

The evidence was brief, simple and practically undisputed. At the close of the evidence both sides moved for the direction of a verdict, and the jury were formally directed at the time to find a verdict

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for the plaintiff, which they did, assessing the penalty at $100. All proceedings after the entry of the verdict were stayed until the court could consider the legal questions involved in the controversy.

The refusal to serve the plaintiff was apparently on purely personal grounds. The refreshment asked for by the plaintiff was not refused, withheld from or denied to him on account of race, creed or color. Therefore, it seems that the interpretation in the Court of Appeals in *Grannan* v. *Westchester Racing Association,* 153 N. Y. 449, as extended and applied under the present statute in *Woollcott* v. *Shubert,* 217 id. 212, forbids the application of the statute to the state of facts recited here.

It may be conclusively determined after an examination of the last-quoted authorities that " the legislature did not intend to confer upon every person all the rights, advantages and privileges in places of amusement or accommodation, which might be enjoyed by another. Any discrimination not based upon race, creed or color does not fall within the condemnation of the statute."

It would seem then that the common-law right still remains with those not engaged as common carriers, or in like occupations, to discriminate between persons according to rules established where the person applying for accommodation is objectionable for some reason. Otherwise, persons unclean, untidy, intoxicated or affected by disease might claim the same attention in a crowded restaurant or other public place as those against whom no objection could be urged. *Brandt* v. *Mink,* 38 Misc. Rep. 750.

Whether or not plaintiff had a remedy at common law for any indignity or humiliation caused by the act of the defendants need not be considered here, although some of the authorities cited on the plain-

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tiff's brief discussed that question. The action is brought solely on the theory that the plaintiff is entitled to recover a penalty or forfeiture given under the Civil Rights Act where a violation occurs.

It follows that the verdict in favor of the plaintiff, rendered as directed by the court, must be set aside, and the defendants should have judgment dismissing the plaintiff's complaint on the merits.

Ordered accordingly.

Matter of the Application of ANNIE REMSKE, for the Restoration to Her of Her Child, GEORGE KLEIN, Now in the Custody of the Board of Managers of the State Agricultural and Industrial School at Industry, Monroe County, New York.

(Supreme Court, Nassau Special Term, May, 1916.)

Penal Law, § 486(7) — husband under no legal liability to support wife's bastard child — commitment to state industrial school.

A husband is under no legal obligation to support his wife's bastard child and is not its legal custodian, and where on his complaint under section 486(7) of the Penal Law the child is committed to a state industrial school without notice of the hearing to the mother her petition that the custody of her child be awarded to her will be granted.

APPLICATION by a mother to obtain the custody of her son.

H. Willard Griffiths, for petitioner.

Frederick G. Traver, district attorney, in opposition.

HASBROUCK, J. Subdivision 5 of section 486 of the Penal Law provides: "Whenever any child shall be

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committed to an institution under this chapter, and the warrant or commitment shall so state, and it shall appear therefrom that either parent, or any guardian or custodian of such child, was present at the examination before such court or magistrate * * * no further or other notice required * * * shall be necessary, * * * to authorize * * * institutions * * * to retain such child in its custody."

A complaint was made by one Joseph Remske, the husband of Annie Remske who had a bastard child named George Klein, against the said child under subdivision 7 of section 486 of the Penal Law, before the justice of the peace of the town of Hempstead, Nassau county, N. Y., sitting as a Children's Court, October 22, 1915. A hearing was had upon such complaint, and, without it appearing that the mother was present in the court or had notice of the hearing, George Klein after having admitted the charge of deserting the home of Joseph Remske was committed to the State Agricultural and Industrial School at Industry, N. Y.

Application is now made by the mother to obtain custody of her son. It is objected that this proceeding by petition is not warranted. There seems to be precedent for it in *Application of Tierney,* 128 App. Div. 835, citing *Matter of Knowack,* 158 N. Y. 482. If the complainant before the Children's Court was not the parent or custodian of Klein, and his mother had not notice of the proceeding, it would seem to me there was no jurisdiction in the court to commit the defendant Klein. *Furman* v. *Van Sise,* 56 N. Y. 435.

The statute speaks with exactitude the language of the law and not common parlance in the use of the terms "parent," "guardian" and "custodian." What is meant is the legal parent, guardian or cus-

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todian. Measured by such interpretation the question is, was Joseph Remske the legal custodian of Klein? There was no obligation resting on Joseph to support and maintain his wife's child. Such is the obligation rather of the mother. Herein lies the reason for holding the legal custody to be in her. *Furman* v. *Van Sise*, 56 N. Y. 435.

Petition granted.

WILLIAM GUGGENHEIM, Plaintiff, *v.* ISAAC GUGGENHEIM et al., Defendants.

(Supreme Court, Kings Special Term, May, 1916.)

Judgment — motion for, on the pleadings — trial — pleading — partnership — Code Civ. Pro. § 547.

Where a complaint entitles plaintiff to any relief, legal or equitable, even though the judgment demanded be not the precise relief to which he is entitled, defendant's motion for judgment on the pleadings under section 547 of the Code of Civil Procedure will be denied.

A defendant by moving for judgment under section 547 of the Code of Civil Procedure admits all the allegations of fact contained in the complaint, and the court must assume that they are true, and defendant is only entitled to an order granting his motion where the pleadings are legally insufficient or no issue of fact is raised.

Issues of fact must be determined at the trial and cannot be summarily disposed of on a motion for judgment on the pleadings.

Upon a motion for judgment on the pleadings they must be liberally construed in favor of the pleader so far as matters of form are concerned, but the answer may not be considered in determining whether the complaint states facts sufficient to constitute a cause of action.

The complaint in an action by one partner by which he seeks to compel defendants, his co-partners, to share with him the profits and benefits which, as alleged, they acquired to their

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own advantage because of their failure to acquaint plaintiff fully and fairly as their partner with the conditions and circumstances surrounding a certain business venture set forth, considered, and held to state a cause of action.

MOTION for judgment on the pleadings pursuant to section 547 of the Code of Civil Procedure.

Stephen C. Baldwin (Stephen C. Baldwin and Henry A. Uterhart, of counsel), for plaintiff.

Guggenheimer, Untermyer & Marshall (Louis Marshall, Francis Lynde Stetson, John B. Stanchfield and William D. Guthrie, of counsel), for defendants.

BENEDICT, J. The defendants, having served an amended answer herein, move for judgment dismissing the complaint herein on the pleadings, pursuant to section 547 of the Code of Civil Procedure.

It was contended upon the argument of the motion, on behalf of the defendants, that the complaint does not state facts sufficient to constitute a cause of action; but, notwithstanding the very able and complete statement of the grounds of this objection contained in the briefs submitted by their counsel, I am unable to concur in their contention.

The Code has laid down certain fundamental rules to be observed by pleaders, and to be given effect by the court, concerning the matters proper to be stated in a complaint.

"The complaint must contain * * * A plain and concise statement of the facts constituting each cause of action without unnecessary repetition" (§ 481), and it is also provided that: "The allegations of a pleading must be liberally construed, with a view to substantial justice between the parties." § 519.

In addition to these general provisions the Code

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was, in 1908, amended by the addition of the new section 547 which provides that: "If either party is entitled to judgment upon the pleadings, the court may upon motion at any time after issue joined give judgment accordingly."

This section has been very extensively availed of by litigants and has been the subject of much judicial consideration. I shall advert briefly to some of the rules concerning it which the courts have laid down.

In *Clark* v. *Levy,* 130 App. Div. 389, it was held that the purpose of the section was to obviate the necessity of waiting until the trial to make such a motion; but the rules are the same as where the motion is made at trial, and the defendant is not entitled to judgment if the complaint entitles the plaintiff to any relief, legal or equitable, even though the judgment demanded be not the precise relief to which he is entitled, citing *Wetmore* v. *Porter,* 92 N. Y. 76; *Hotel Register Co.* v. *Osborne,* 84 App. Div. 307. See also to same effect, *Dineen* v. *May,* 149 App. Div. 471; *Olsen* v. *Singer Man. Co.,* 143 id. 142; *Delmar* v. *Kinderhook Knitting Co.,* 134 id. 558; *National Park Bank* v. *Billings,* 144 id. 536; affd., 203 N. Y. 556; *Schleissner* v. *Goldsticker,* 135 App. Div. 435; *O'Rourke* v. *Patterson,* 157 id. 284; *Perrin* v. *Smith,* 135 id. 127.

A defendant, by moving for judgment under this section, admits every material allegation of fact contained in the complaint, and the court must assume that the allegations are true. *DeWolf* v. *Ford,* 193 N. Y. 397; *Clark* v. *Levy, supra; Ship* v. *Fridenberg,* 132 App. Div. 782; *Felt* v. *Germania L. Ins. Co.,* 149 id. 14, and *Longenecker* v. *Longenecker Bros.,* 140 N. Y. Supp. 403, where I had occasion to notice this point and to consider the cases.

The moving party is only entitled to judgment if the pleading moved against be insufficient in law, or

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if no issue of fact be raised. Per Stapleton, J., in *Continental Sec. Co.* v. *Belmont,* 75 Misc. Rep. 234, 237; affd., 150 App. Div. 298; 206 N. Y. 7.

Issues of fact must be determined on the trial; and, although a party may, as a matter of law, be entitled to part of the relief demanded, relief should not be granted piecemeal, but the motion for judgment should be denied *in toto. Emanuel* v. *Walter,* 138 App. Div. 818.

Where an issue of fact exists it must be disposed of upon the trial and it cannot be summarily disposed of on a motion for judgment on the pleadings. *Simon* v. *Bierbauer,* 154 App. Div. 506; *Godwin* v. *Liberty-Nassau Building Co.,* 144 id. 164.

"Upon such a motion not only must the complaint be liberally construed (Code Civ. Pro., § 519), but such construction, so far as matters of form are concerned, must be in favor of and not against the pleadings," per Burr, J., in *Catterson* v. *Brooklyn Heights R. R. Co.,* 132 App. Div. 399, citing cases. See also *Crotty* v. *Erie R. R. Co.,* 149 App. Div. 262, and *McCarthy* v. *Heiselman,* 140 id. 240.

Where an answer has been served its allegations cannot be considered in determining, upon a motion of this nature, whether the complaint fails to state facts sufficient to constitute a cause of action. *People* v. *O'Brien,* 157 App. Div. 119; affd. on this point, 209 N. Y. 366, 369.

The complaint in the present case alleges as follows:

Paragraph "First" of the complaint alleges the formation of a partnership between the plaintiff and the defendants, who are plaintiff's brothers, together with their father, Meyer Guggenheim, and a brother, Benjamin Guggenheim, for the purposes set forth in a written agreement which is annexed to the complaint as Exhibit "A."

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This Exhibit "A," after providing that upon the death of any one of the partners the business shall be carried on until the expiration of a year from the death of the first partner so dying, then provides for the business to be conducted as follows:

"It is further agreed that the business of the said co-partnership shall be: (1) The business that was being carried on at the date of these presents by the said co-partnership of M. Guggenheim's Sons of which this agreement provides for a continuance with the introduction as partners into said co-partnership of the said Benjamin Guggenheim, Simon Guggenheim and William Guggenheim except the business of holding and working said mines which business shall be conducted only by said Isaac Guggenheim, Daniel Guggenheim, Morris Guggenheim and Solomon Guggenheim until the payment for said stock and delivery of certificates, as aforesaid; (2) any other lawful business which the parties to this agreement shall mutually agree to undertake."

This agreement further provided for a division of profits and losses and also contained the following:

"The said Isaac Guggenheim, Daniel Guggenheim, Morris Guggenheim and Solomon Guggenheim, agree not to embark into any new business, except hereunder, but said Isaac Guggenheim, Daniel Guggenheim, Morris Guggenheim and Solomon Guggenheim who constituted said firm of M. Guggenheim's Sons, may deal with the assets of said firm enumerated in the schedule of even date herewith, at their pleasure and in their absolute discretion, but no enterprise or business not on said schedule shall be carried on, except by the partnership hereby constituted."

The complaint further alleges that Morris Guggenheim and Benjamin Guggenheim have died since the

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formation of the partnership, and that neither of them participated in any of the acts therein complained of.

Paragraph "Second" of the complaint set forth the continuance of the partnership for more than two years after the death of Benjamin Guggenheim on April 15, 1912, and that the defendants, on April 20, 1914, published a notice of dissolution of the partnership; and it alleges

"On information and belief, that thereafter the business of the said firm of M. Guggenheim's Sons was duly liquidated and that, so far as plaintiff is informed, no claim exists in his favor against said firm, and that the claim hereinafter set forth is not asserted against the said firm of M. Guggenheim's Sons, nor against any of the surviving partners thereof, but is asserted as a claim against the defendants individually for damages by reason of their acts, which hereinafter will be more particularly set forth and described."

Paragraph "Third" alleges the obligations of the defendants as the plaintiff's partners to act toward him in the highest good faith, and that they should not, by the slightest misrepresentation, concealment or otherwise, secure to themselves any advantage over the plaintiff.

Paragraph "Fourth" alleges that immediately following the execution of the partnership agreement the plaintiff entered into and continued upon an active participation in the affairs and business of the said partnership until the year 1900.

Paragraph "Fifth" alleges that in the year 1900 the plaintiff, with the full consent and approval of his copartners, including the defendants, temporarily withdrew from active participation in the business and affairs of said firm, and such inactivity continued until the latter part of the year 1911, although, during all of such period, he had remained a partner in said firm

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liable for all of its indebtedness, and contributing his portion of the expenses of running the offices of said firm; and that, during such period, at the request of the other members of the firm, he executed waivers or releases of participation in certain new enterprises in which they, or some of them, sought to embark.

Paragraph "Sixth" alleges that in the latter part of 1911 the plaintiff communicated to the defendants his purpose to resume active participation and co-operation in the business of M. Guggenheim's Sons, and the defendants expressed a desire on their part that the plaintiff should so return to such an active participation and co-operation.

Paragraph "Seventh" alleges that thereafter, by agreement with the defendants, he became chairman of the board of directors of the International Steam Pump Company, whose policies were dictated by M. Guggenheim's Sons, and entered into the active management of said company whereby he was prevented for the time being from acquiring a knowledge of the activities in other enterprises in which the firm of M. Guggenheim's Sons was interested, or was becoming interested.

Paragraph "Eighth" alleges that on January 4, 1912, the plaintiff, at the solicitation of the defendants, executed an agreement, a copy of which is annexed to the complaint as Exhibit "B."

Exhibit "B" consists of two parts, the first part being an agreement signed by the five defendants which, in substance, is as follows:

It recites that the firm of M. Guggenheim's Sons is composed of the plaintiff, the defendants and Benjamin Guggenheim (since deceased), and that the defendants (therein designated as the subscribers) are desirous of engaging in certain ventures now known as the "Andacella Prospect," the "Las Condes Pros-

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pect," the "Chuquicamata Prospect" and the "South American Exploration" to acquire certain mining properties and rights for their mutual benefit, and that the remaining members of said firm, to wit, Benjamin Guggenheim and William Guggenheim, although not participants in said ventures, are willing that the business thereof, and also the business of other ventures in which the subscribers or some of them might thereafter engage, might be conducted by and in the name of M. Guggenheim's Sons, so far as it might be useful so to do, and then provides that the defendants (therein designated as subscribers) mutually agree to undertake the aforesaid ventures, and carry on the operations for which they are formed, and that each of them will contribute an equal part of the capital required therefor, and the net profits, or the net losses, shall be equally shared by the subscribers; and they further agree to indemnify the said firm of M. Guggenheim's Sons and the nonparticipating members, the plaintiff and Benjamin Guggenheim, against any loss by reason of said ventures.

The second part of Exhibit "B" is executed by Benjamin Guggenheim and William Guggenheim, who are therein designated as the subscribers. This recites that the subscribers, who are members of the firm of M. Guggenheim's Sons, are not participants and have no interest in the "Andacella Prospect," the "Las Condes Prospect," the "Chuquicamata Prospect" and the "South American Exploration" described in the former instrument, and that the subscribers are willing that the other members of said firm shall be permitted to use the firm name and organization of M. Guggenheim's Sons for the transaction of the business of said ventures, and that, therefore, in consideration of the promises:

"The Subscribers hereto do hereby expressly waive

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any participation in the profits that may result from the operations of the aforesaid Ventures, and hereby disclaim any responsibility for any losses that may accrue therefrom, and it is further hereby expressly agreed that the Subscribers shall have no interest in, or claim upon, any other enterprises or Ventures which the said members, or some of them, may undertake, unless the Subscribers, upon invitation, shall, in writing, agree to become interested in such ventures or enterprises and to contribute and pay their proportion of the money, needed for the same and to assume their proportion of the liabilities incurred therein, but nevertheless, the Subscribers consent that the parties to the instrument hereinbefore referred to, who have undertaken the said ventures, and such members as may hereafter undertake other ventures or enterprises, shall use the firm name of M. Guggenheim's Sons and avail themselves of the organization and facilities afforded by the said firm without any cost or expense to the members of said ventures and without any liability to account to the Subscribers for any profits, benefits or advantages derived therefrom or from the business of the said Ventures."

Paragraph "Ninth" alleges:

"That at the time of the execution of said agreement the defendants were, and for a long time prior thereto had been (without the knowledge of the plaintiff) engaged in an extensive survey, exploration, examination and investigation of the enterprise therein designated as the 'Chuquicamata Prospect,' and at the time they solicited and obtained the execution of the said agreement by the plaintiff, and for a long time prior thereto, the defendants well knew that the said 'Chuquicamata Prospect' included and embraced properties of great value, which had been or could be acquired by the said firm of M. Guggenheim's Sons

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at a price and upon terms that would realize large profits for said firm."

Paragraph "Tenth" alleges:

"That the said defendants wrongfully and wilfully concealed from the plaintiff the fact that they had made extensive surveys, explorations, examinations and investigations of the enterprise designated in said agreement as the 'Chuquicamata Prospect,' and wrongfully and wilfully concealed from the plaintiff, whom they knew to be ignorant thereof, the real value of the said 'Chuquicamata Prospect,' and the said defendants wrongfully and wilfully concealed from the plaintiff the great advantage which would inure to them and the great disadvantage which would be suffered by him by his surrender and release of his right as a member of the said firm of M. Guggenheim's Sons to participate in the acquisition, exploitation and development of the said 'Chuquicamata Prospect,' all of which was in violation of their duty toward him as a partner."

Paragraph "Eleventh" alleges:

"That the said agreement bearing date January 4, 1912, aforesaid, was executed by the plaintiff without consideration and in ignorance of the matters set forth in paragraphs designated herein as 'Ninth' and 'Tenth,' and because of plaintiff's implicit confidence in the defendants as his brothers and as his partners, and by reason of his belief that they were dealing with him in a full realization of the obligations due and owing from them to him as partners, and relying upon them to treat fairly with him, and believing that they would request no action on his part which would, to their knowledge, bring to them a benefit, which by right belonged to him."

Paragraph "Twelfth" alleges:

"That the plaintiff would never have executed the

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said agreement, had he been informed by the defendants of the true condition and value of the 'Chuquicamata Prospect' and the terms upon which it had been or could be acquired, of which condition, value and terms defendants were fully informed; but on the contrary the plaintiff would have insisted upon his right as a member of said firm of M. Guggenheim's Sons to fully participate and co-operate in the acquisition, exploitation and development of the same and to his share in the profits arising therefrom."

Paragraph "Thirteenth" alleges that the defendants have secured to themselves securities, properties and moneys of the value of $60,000,000 from the "Chuquicamata Prospect" and have refused to pay the plaintiff his proper share thereof to his damage in the sum of $10,000,000.

Assuming the allegations of the complaint as true, and considering the facts alleged therein as admitted for the purpose of this motion, the complaint, in my opinion, is not open to the criticisms which the defendants have urged against it.

The foundation of the plaintiff's claim is the breach of the defendants' duty towards him as their partner. The object of the action is not to set aside or cancel the settlement of the partnership accounts, which the complaint alleges took place between the plaintiff and the defendants; nor is it to set aside and cancel the agreement annexed to the complaint and marked Schedule "B." What the plaintiff does seek to accomplish by the action is to compel the defendants to share with him the profits and benefits which he alleges they have acquired to their own advantage by reason of their failure to acquaint him fully and fairly as their partner with the conditions and circumstances surrounding the venture designated in the complaint as the "Chuquicamata Prospect," and from which advan-

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tages and benefits he alleges that they had excluded him by inducing him to execute the agreement, Schedule "B," unwittingly, and in the absence of a full disclosure on their part. In other words, the basis of the action is their fraudulent concealment from him of knowledge which they had acquired in the partnership business concerning that property, and which fraudulent concealment induced him to forfeit his rights as a participant in that portion of the copartnership business.

The defendants, in their brief, have discussed and referred to many decisions in our courts in actions between partners, but I have been unable to find among them any case which sustains their position that under the circumstances disclosed by the complaint in this action the plaintiff has failed to state facts sufficient to constitute a cause of action. On the contrary, the underlying principle upon which this action rests has many times been asserted, both in the decisions of our courts and in the pages of text writers, and is too firmly fixed in our jurisprudence to admit of question at this time. The principle to which I refer is that of *uberrima fides,* the corner-stone without which it is impossible to rear the structure of any copartnership. This is not alone a principle of ethics—it is a rule of positive law.

The comprehensive briefs submitted by the learned counsel in this case manifest their appreciation of the serious consequences to their respective clients of the issues now under consideration, and offer a temptation, difficult to resist, to expand this memorandum unduly. I shall, however, only refer to a few authorities in support of the conclusion which I have reached.

The question has been considered by the Supreme Court of the United States in *Brooks* v. *Martin,* 2 Wall.

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70. In this case, Mr. Justice Miller, in delivering the opinion of the court, said:

"Brooks and Field thus managed the entire concern, at a distance of near two thousand miles from Martin, and, as we think the testimony shows, without consulting him in any way, and with very little regard for his large interest in the business.

"Under these circumstances, Brooks must be held to have been not only the partner, but the special agent of Martin; and the purchase made by him of Martin's interest must be tested by the rules which govern such transactions as between principal and agent.

"What are these rules? 'On the whole, the doctrine may be generally stated, that wherever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage. * * * Or, to speak more specifically, 'if a partner who exclusively superintends the business and accounts of the concern, by concealment of the true state of the accounts and business, purchase the share of the other partner for an inadequate price, by means of such concealment, the purchase will be held void.'

"Speaking of a purchase by a trustee from his *cestui que trust,* Lord Chancellor Eldon says, in the case of Coles v. Trecoothick, that thought permitted, it is a transaction of great delicacy, and which the court will watch with the utmost diligence; so much, that it is very hazardous for a trustee to engage in such a transaction. 'A trustee may buy from the *cestui que trust,* provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances; provided the *cestui que trust* intended the trustee should buy; and there is no fraud, no concealment, no advantage

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taken by the trustee of information acquired by him in the character of trustee. I admit,' he says, 'it is a difficult case to make out, wherever it is contended that the exception prevails.' This has long been regarded as a leading case, and the above remarks have been often cited by other courts with approbation. We think them fully applicable to a purchase, by an agent from his principal, of the property committed to his agency.' * * *

"We lay down, then, as applicable to the case before us, and to all others of like character, that in order to sustain such a sale, it must be made to appear, first, that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased; and, second, that all the information in possession of the purchaser, which was necessary to enable the seller to form a sound judgment of the value of what he sold, should have been communicated by the former to the latter."

In *Butler* v. *Prentiss,* 158 N. Y. 49, Vann, J., in writing for a unanimous court, reviews the authorities and ably and clearly states the law in the following words:

"As was said in *Mitchell* v. *Reed* (61 N. Y. 123, 126): 'The relation of partners with each other is one of trust and confidence. Each is the general agent of the firm, and is bound to act in entire good faith to the other. The functions, rights and duties of partners in a great measure comprehend those both of trustees and agents, and the general rules of law applicable to such characters are applicable to them.'

"In *Maddeford* v. *Austwick* (1 Sim. 89; affirmed in 2 Myl. & K. 279) the court said: 'The defendant, being the partner whose business it was to keep the accounts of the concern, could not, in fairness, deal with the plaintiff for his share of the profits of the concern, without putting him into possession of all the

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information which he himself had with respect to the state of the accounts between them. The defendant knew, from the account in his possession, that the £1,000 was not an adequate consideration for the plaintiff's share of profits, and he cannot be permitted, in a court of equity, to maintain advantage which he has gained over the plaintiff's ignorance. * * * The supposed account of the profits of the concern, up to the end of 1817, necessarily formed the basis of the plaintiff's calculation of profits for the ensuing three years, and, being misled in that respect, he is entitled to avoid the whole agreement, and to have an account of the profits of the concern up to the dissolution in 1821. The defendant's argument of confirmation of the agreement by the subsequent conduct of the plaintiff, fails altogether, it not being pretended that, at the time of such acts on the part of the plaintiff, he was aware of the advantage which the defendant had gained over him.'

"A learned author speaking upon this subject has recently said: 'The partners owe to each other the most scrupulous good faith. Each one has a right to know all that the others know, and their connection is one of great confidence; and the *uberrima fides* of a fiduciary relation will be the standard of fidelity exacted from them. * * * There is no principle of law that prevents one partner buying out the interest of the other, or selling to him in good faith, provided he acquires no secret benefit for himself at the expense of his copartner, by suppressing information or concealing facts which the latter was entitled to know. * * * But deception of any kind or the non-disclosure of material facts, especially by a managing partner, will vitiate the sale.' (Bates on the Law of Partnership, §§ 303, 309.)

"So Judge Story, in his valuable work on Partner-

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ship (§ 172), says: 'Good faith not only requires that every partner should not make any false representation to his partners, but also that he should abstain from all concealments which may be injurious to the partnership business. If, therefore, any partner is guilty of any such concealment, and derives a private benefit therefrom, he will be compelled in equity to account therefor to the partnership. Upon the like ground, where one partner, who exclusively superintended the accounts of the concern, had agreed to purchase the share of his copartners in the business for a sum which he knew, from the accounts in his possession, but which he concealed from them, to be for an inadequate consideration, the bargain was set aside in equity as a constructive fraud; for he could not in fairness deal with the other partners for their share of the profits of the concern without putting them in possession of all the information which he himself had with respect to the state of the accounts and the value of the concern.' (See, also, *Kimberly* v. *Arms,* 129 U. S. 512; Lindley on Partnership, 303; Parsons on Partnership, 192.)

"But in addition to the business relations of the parties, their personal relations were intimate and confidential, and the plaintiff trusted the defendant as an old friend, superior to himself in business experience and ability. Moreover, the defendant, who knew all about the books and business, encouraged the plaintiff, who knew little about either, to act under a mistake as to a fact of great importance, caused by a misrepresentation made in his presence, not only undenied by him, but made the basis of an argument to persuade the plaintiff to enter into the contract.

"In *Hammond* v. *Pennock* (61 N. Y. 145, 152) this court said: 'The case has thus far been considered as though the fraud requisite as a basis for rescinding a

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contract in equity is the same in nature as that demanded in a court of law in an action for damages for deceit. In equity, the right to relief is derived from the suppression or misrepresentation of a material fact, though there be no intent to defraud. * * * This doctrine is, substantially, grounded in fraud, since the misrepresentation operates as a surprise and imposition upon the opposite party to the contract. It is inequitable and unconscientious for a party to insist on holding the benefit of a contract which he has obtained through misrepresentations, however innocently made.' (Citing *Peck* v. *Gurney*, L. R. [13 Eq.] 79, 113; *Wilcox* v. *Iowa University*, 32 Iowa, 367; *Smith* v. *Reese River Co.*, L. R. [2 Eq.] 264; *Kennedy* v. *Panama Co.*, L. R. [2 Q. B.] 580; 1 Story on Eq. Jur. § 193, and cases cited; Perry on Trusts, § 171.)

"In *Brooks* v. *Martin* (2 Wall. 70, 82) the Supreme Court of the United States said that 'If the parties are to be regarded in this transaction as holding towards each other no different relations from those which ordinarily attend buyer and seller, and as, therefore, under no special obligation to deal conscientiously with each other, we are satisfied that no such fraud is proven as would justify a court in setting aside an executed contract. But there are relations of trust and confidence which one man may occupy towards another, either personally or in regard to the particular property which is the subject of the contract, which impose on him a special and peculiar obligation to deal with the other person towards whom he stands so related, with a candor, a fairness, and a refusal to avail himself of any advantage of superior information, or other favorable circumstances, not required by courts of justice in the usual business transactions of life.'

"The conclusion of the learned referee, that the

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plaintiff assented to the agreement in reliance upon previous misrepresentations made by the manager 'and the defendant,' was clearly right, but we think that he did not give to that conclusion the full force required by law, as he granted the plaintiff relief only as to a part of the arrangement. He appears to have proceeded on the theory that the defendant was guilty of constructive fraud as distinguished from moral fraud. Constructive fraud, however, sometimes called legal fraud, is, nevertheless, fraud, although it rests more upon presumption and less upon furtive intent than moral fraud. (*Cowee* v. *Cornell*, 75 N. Y. 91, 99.) Where fiduciary relations exist, and a condition of superiority is held by one of the parties over the other, 'in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the presumption.' Pomeroy's Eq. Jur. § 956.)

"As was said in *Tate* v. *Williamson* (L. R. [2 Ch. App.] 55, 60): 'Wherever two persons stand in such a relation, that while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.'"

And these principles have been recently restated and reaffirmed in *Selwyn & Co.* v. *Waller*, 212 N. Y. 507, where Miller, J., writing, says:

"It may be admitted that the question lies on the

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boundary between the domain of law and that of ethics. A majority of the Appellate Division were of the opinion that no duty rested on Waller to disclose his interest because it made no difference to Shubert to whom the royalties were paid. That position overlooks the fact that in assuming two-thirds of Waller's obligation to Frohman, Shubert was interested in knowing precisely what that obligation was, and it takes a too narrow view of the duties of parties about to engage in a joint adventure, whether as partners *inter sese* or not. It is now well settled that persons in, or about to assume, that relation owe to each other the utmost good faith and the most scrupulous honesty. (*Getty* v. *Devlin,* 54 N. Y. 403; *Mitchell* v. *Reed,* 61 N. Y. 123; *Kimberly* v. *Arms,* 129 U. S. 512.) They do not deal at arms' length. The very fact that one conceals his true interest from the other indicates a purpose to gain some advantage at the other's expense or a belief that disclosure would influence the other in deciding whether and upon what terms to embark on the enterprise. Good faith requires that neither shall make a secret profit out of the undertaking. The rule against secret profits is not limited in its application to cases of agency, trusteeship and the like strictly fiduciary relations. Its application to a case like this depends on the reciprocal good faith required of joint adventurers and more precisely upon the mutual burdens and benefits which the relation necessarily implies are to be shared in the stipulated proportions. If Waller had acquired his interest in the authors' royalties after making the contract with the appellant, he would plainly have been bound to give the joint undertaking the benefit of it. That the concealment of his interest at the time of making the contract puts him in the same case is settled in this state by authority. (*Getty* v. *Devlin, supra.*) It begs the question to say

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that it was immaterial to the appellant to whom the royalties were paid. If the duty of disclosure existed, the law will not impose upon the party wronged the often impossible task of establishing pecuniary damage or that he would not have embarked on the undertaking if disclosure had been made. The case is precisely the same in principle as though Waller had owned the entire interest in the authors' royalties and, concealing the fact, had induced his co-adventurer to purchase it outright from the apparent owners at a large advance over the cost to him, the familiar case of promoter's secret profits. Indeed, in some aspects, Waller's position is worse than that of the typical dishonest promoter who takes his illicit profit at the inception of the enterprise. Waller had secretly arranged to receive a percentage, not of the profits, but of the gross receipts of the business, so long as it continued, although he had stipulated to share profits and losses in stated proportions. It is unnecessary accurately to measure the extent or precisely to determine the nature of the injury which was, or might thus have been, done to Shubert. That injury might have resulted is obvious. It is sufficient to determine that Waller was guilty of the breach of a legal duty, of the failure to conform to the high standard of honesty and good faith which the law exacts of one partner or co-adventurer towards the others. In our opinion that standard should not be lowered by putting dubious conduct outside of the domain of law, especially as exact justice can always be done by making the wrongdoer a trustee of his secret interest for himself and his associates."

The motion is denied, with costs.

Motion denied, with costs.

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EVA E. GOVERS, Plaintiff, v. CITY OF NEW ROCHELLE, Defendant.

(Supreme Court, Westchester Special Term, May, 1916.)

City of New Rochelle — charter of, § 421 — fixing of district of assessment by common council — municipal corporations — actions — Code Civ. Pro. § 1638.

Under section 421 of the charter of the city of New Rochelle its common council in fixing a district of assessment to cover one-third of the expense of laying out a new street, the city to pay the balance, is under obligation to establish a district of assessment which shall contain all the real property which, in the judgment of the common council, is likely to be benefited by the improvement.

In an action brought under section 1638 of the Code of Civil Procedure to cancel an assessment on plaintiff's property on the ground that it was illegal and void because made in excess of the jurisdiction of the common council in creating the district of assessment, it will be presumed that the common council did establish a district of assessment containing all the property likely to be benefited by the improvement and, in the absence of fraud or bad faith, its action is conclusive.

ACTION to cancel assessment for opening Division street, in the city of New Rochelle.

Michael J. Tierney, for plaintiff.

Edward W. Davidson, Corporation Counsel, for defendant.

YOUNG, J. The plaintiff brings this action under section 1638 of the Code of Civil Procedure claiming that an assessment levied by the defendant against her property to defray a portion of the expense of laying out, opening and grading Division street, be-

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tween Huguenot and Main streets, is illegal and void because made in excess of the jurisdiction of the council of the city of New Rochelle in creating the district of assessment. Pursuant to the resolution of the council two-thirds of the expense of laying out the new street was assessed upon all the property within the city limits and paid for by a bond issue; the remaining one-third was assessed against property immediately fronting on the new street, and the plaintiff's contention is that this assessment is illegal and void because the council failed to include other property in the immediate neighborhood of the street which was plainly benefited by the improvement. The improvement was made pursuant to the provisions of the city charter, and section 421 of said charter provides as follows:

"*Power of council as to street improvements.*— The council may by resolution provide for the laying out, opening, extending, widening and grading of streets, and for the construction of drains and culverts. *The expense and cost of all street* improvements authorized by the council as provided in this section shall be borne by the owners of the lots or parcels of land benefited thereby, and the council *may establish a district of assessment which shall contain all the real property which in its judgment is likely to be benefited by such improvements.* No such improvement *shall be made or contracted* for until the estimated expense has been *apportioned and assessed* upon the property to be benefited thereby, and such apportionment and assessment has been confirmed according to the provisions of this act; *but the council may authorize the making of any* of the improvements mentioned in this section at the expense of the city at large, if such estimate of cost and expense does not exceed the sum of five thousand dollars; or in case the council

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shall deem it equitable, it may by resolution provide that a portion of the entire expense, stating the proportion in such resolution, shall be charged against the city at large and *the remainder assessed as herein provided.*"

In my opinion, according to the provisions of the above section, the council is obliged to establish a district of assessment which shall contain all the real property which in its judgment is likely to be benefited by the improvement, where a portion of the entire expense is to be assessed, as well as in the case where the entire expense of the improvement is to be apportioned and assessed upon the property to be benefited. In other words, in the case of this improvement, I think the council in fixing a district of assessment to cover one-third of the entire expense of the improvement was under the obligation to establish a district of assessment which should contain all the real property which in its judgment was likely to be benefited by the improvement.

I think, however, it must be presumed that the council in establishing the district of assessment in connection with this improvement exercised its judgment, and did establish a district of assessment containing all the property likely to be benefited by the improvement. In doing this the council plainly performed a legislative act, and its action is conclusive in the absence of fraud or bad faith. *Matter of Cruger,* 84 N. Y. 619; *Genet* v. *City of Brooklyn,* 99 id. 296; *Hoffeld* v. *City of Buffalo,* 130 id. 387; *People ex rel. New York, West. & B. R. Co.* v. *Waldorf,* 168 App. Div. 473; affd., 217 N. Y. 96. In *Matter of Cruger, supra,* Judge Finch said: "The objection to the principle upon which the assessors acted in making their assessments for benefit is equally unavailing. (*Matter of Eager,* 46 N. Y. 109.) The conclusion reached by them was

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a matter of judgment on their part. It was their duty to judge. They had opportunity to examine personally. Elements went to the formation of their conclusions, which cannot be placed before us. We cannot say their determination was erroneous, even if it was exposed fully to our review. To criticise the results of their judgment would practically require that we should ourselves try every question of value and of benefit, and that too upon evidence different from that before the assessors. Their error of judgment, if in fact it existed, was not an error in the proceedings, and not the subject of our review under the statute. A similar answer disposes of the objection that the area of the assessment for benefit was too small. The law committed that question to the assessors and the board of revision. They acted upon such knowledge and observation as they had, and such proof as was presented. They had a discretion to exercise in this respect which we cannot review. The petitioner is in substance asking us to substitute the opinion and judgment of his witnesses as to the area of benefit, for that of the officers to whom it was committed by the statute. (*Matter of Church street,* 49 Barb. 455.)"

I have carefully examined all the cases cited upon the brief submitted by the plaintiff's attorney. It seems to me that in none of them are the facts similar to those in the case under consideration. The facts shown present rather a hard case for the plaintiff. The principal sum of the assessment levied for the improvement against her property amounts to $1,517.38. Her property as a whole was assessed at the time for $2,040. The question as to whether the assessment of the cost of this improvement upon the several parcels within the area was properly apportioned by the assessors, is not in issue here, and under

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the authorities as I view them the court is powerless to relieve the plaintiff in this action.

Judgment should, therefore, be for the defendant, dismissing the complaint upon the merits, but without costs.

Judgment for defendant, without costs.

HERMAN ROSITZKE, Plaintiff, *v.* GEORGE WILLIAM MEYER, Individually, etc., et al., Defendants.

(Supreme Court, Westchester Special Term, May, 1916.)

Statute of Limitations — when payments by executrix on debt due from her testator prevents running of.

Wills — direction to pay debts — power of sale as to real estate — executors and administrators.

Jurisdiction — of Supreme Court and Surrogate's Court — executors and administrators — accounting.

A debtor died before the Statute of Limitations had commenced to run against his debt and his executrix before such time made payments of principal and interest on the debt and her executor promised by letter to make payment on account and did, in fact, make several payments of interest. Held, that the assignee of the creditor was entitled to maintain an action against the executor of the deceased representative of the estate of the original debtor and to compel an accounting and to have the personal property applied in payment of said debt and, if that were insufficient, to compel a sale of the real estate under the power of sale contained in the debtor's will.

Letters written by the executrix of the debtor must be regarded as having been made in her capacity as executrix, and that the creditor deferred enforcement of his claim without any definite agreement of forbearance was a mere indulgence and insufficient as a consideration for her promise to pay the debt.

Payments by an executrix on a debt due from her testator prevent the running of the Statute of Limitations.

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Payments by the executor of the executrix of the original debtor prevented the running of the Statute of Limitations for six years as in making such payments said executor was not a mere volunteer or stranger to the transaction.

On reargument:

Where in the will of the original debtor a direction to pay his debts was coupled with an imperative power of sale as to his real estate in the executrix who was also the sole devisee and legatee, it was not incumbent upon plaintiff to show that the personalty was insufficient for the payment of debts.

The jurisdiction of the Supreme Court and of the Surrogate's Court as to accounting by executors is concurrent and the surrogate has no power to compel the exercise of a power of sale of a testator's land by his executrix, but the Supreme Court will exercise jurisdiction of an action by creditors to compel an executor to account and sell land for the payment of their debts. While the representative of a deceased executor cannot administer such estate he is bound to account therefor.

ACTION to compel accounting by executor.

Neu, Gilchrist & Spedick, for plaintiff.

Sydney A. Syme, for defendant.

YOUNG, J. The only theory upon which this action can be maintained is as an action for an accounting by George William Meyer as executor of Sophie Meyer of the estate of John N. Meyer of which she was the executrix.

Notwithstanding considerable confusion in the allegations of the complaint, sufficient appears and is supported by the proof to sustain such an action.

The evidence given upon the trial satisfactorily shows that on or about July 1, 1895, John N. Meyer borrowed $3,000 from John and Nicholas Tiedeman, residing in Germany, and gave to them a memorandum

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of indebtedness therefor. Subsequently, in November or December, 1898, he borrowed a further sum of $900, making a total of $3,900. There seems to be no direct proof of the payment of any part of the principal or interest upon the sum borrowed by John N. Meyer during his lifetime.

John N. Meyer died April 7, 1901, leaving a will, which was duly admitted to probate by which, after directing the payment of his debts, he left his property to his wife, Sophie Meyer, and appointed her executrix, giving her power of sale of his real estate.

After the death of her husband, Sophie Meyer wrote a number of letters to John and Nicholas Tiedeman recognizing and promising to pay the debt, and at different times paid interest on account thereof. In November or December, 1904, she made a payment of $500 on account of the principal. The last payment of interest made by her was on or about January 18, 1905.

Sophie Meyer died June 9, 1905, leaving a will which was duly admitted to probate, naming her son, George William Meyer, as one of her executors, and he afterwards duly qualified as such. By her will, after one or more bequests, she left her property to her son, George William Meyer, and to her daughter, Adele Dorothea Meyer.

John N. Meyer left certain real property which was devised to Sophie Meyer, and the same real property was devised by her to George William Meyer and Adele Dorothea Meyer. Neither the executors of John N. Meyer nor Sophie Meyer ever rendered an account, nor have they advertised for debts.

After the death of Sophie Meyer, George William Meyer wrote several letters to the Tiedemans in which he promised to make payments on account of the debt in question, and in fact did make one or more payments

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of interest thereon, the last payment being made by him on March 7, 1908.

Under this proof the plaintiff, who is the assignee of the Tiedemans, is entitled to maintain an action to compel an accounting of the estate of John N. Meyer by the executor of the deceased representative of the estate and to have the personal property applied in payment of the debt, and if that be insufficient, to compel a sale of the real estate under the power of sale contained in the will. *Holly* v. *Gibbons,* 176 N. Y. 520; *Matter of Gantert,* 136 id. 106.

The plaintiff's contention that the debt of John N. Meyer was personally assumed by his widow, Sophie Meyer, based upon the letters written by her, is not sustained by the evidence; *first,* because the evidence does not show that they were made by her individually and must be regarded as made in her capacity as executrix; and *secondly,* there was no consideration to support an agreement by her individually to pay the debt. The most that appears is that the creditors deferred the enforcement of their claims without any definite agreement for such forbearance. It was, therefore, mere indulgence on their part, which is insufficient as a consideration for an agreement by her to pay the debt. *Atlantic National Bank* v. *Franklin,* 55 N. Y. 235; *Perkins* v. *Proud,* 62 Barb. 420.

This conclusion renders it unnecessary to discuss the propriety of the amendment to the complaint granted by the court on the trial.

A more serious question in this case is whether the claim is not barred by the Statute of Limitations. As it appears from the facts above recited, the claim was not barred at the time of John N. Meyer's death, and the payments of interest and principal made by Sophie Meyer, his executrix in her lifetime, prevent the running of the statute until January 18, 1911. *Holly* v. *Gibbons, supra.*

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At the time of Sophie Meyer's death on January 9, 1905, the claim had not yet been barred, and the question which is now presented is whether the payment of interest on the claim made by George William Meyer on March 7, 1908, and his written promise to pay the debt, prevented the running of the statute until six years from that date, or March 7, 1914.

This action was begun April 5, 1912. Upon Sophie Meyer's death and the appointment of George William Meyer as her executor, any creditor of John N. Meyer had an immediate right to compel her executor to account for the estate of John N. Meyer, of which she was executrix. The six years' Statute of Limitations applies to such a right of action, for the reason that it is analogous to an action at law to recover a demand that is due. *Matter of Rogers*, 153 N. Y. 316. But, as we have seen, a payment made by an executor upon a claim against his decedent, not barred at the time of decedent's death, prevents the running of the statute. *Holley* v. *Gibbons, supra.* The rule that a proceeding by a legatee to compel executors to account must be commenced within six years after the expiration of one year after the granting of letters testamentary is subject to the exception that the running of the Statute of Limitations may be intercepted by the act of the executor, and payments by the executor, the same as payments upon a debt by an individual, would bring the case within the exception. *Matter of Campbell,* 21 Misc. Rep. 133, 137.

As the plaintiff had a right of action against the executor of Sophie Meyer to compel him to account for Sophie Meyer as executor of John N. Meyer, any payment made by George William Meyer on account of the debt or interest would have the same effect as though Sophie Meyer were alive and had made the payment herself. To state the principle more concisely,

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it seems to me that, broadly speaking, where a right of action exists against a person in a representative capacity, that person may prevent the running of the Statute of Limitations in the same manner and by the same means as a person acting individually. Payment of interest and a written promise by an individual to pay a debt are well recognized means to accomplish such a result. The payments of interest by George William Meyer and his written promise to pay the debt thus prevented the bar of the statute until six years after his last payment on March 7, 1908. In making these payments he was not a mere volunteer or a stranger to the transaction. As executor of Sophie Meyer, a cause of action against him as such then existed in favor of plaintiff's assignors. He was, therefore, merely performing a legal duty and obligation to make such payments and prevent a suit therefor.

I am of opinion, therefore, that this action commenced on April 5, 1912, was seasonably begun.

The plaintiff should, therefore, have judgment in accordance with this opinion, with costs.

Judgment accordingly.

ON REARGUMENT.

YOUNG, J. After carefully reconsidering the questions presented upon the reargument in this case, and the authorities presented by counsel, I see no reason to alter the conclusion at which I originally arrived. The foundation upon which this action rests is concededly an honest debt due plaintiff's assignors, and the only serious defense presented is the Statute of Limitations.

Defendant's counsel urges three reasons why this action cannot be maintained. (1) That the power of

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sale in the will of John N. Meyer is discretionary and cannot be exercised by Sophie Meyer's executors nor by a trustee appointed by the court, nor its exercise decreed in an action by a general creditor. (2) That this court will not entertain jurisdiction of an action for an accounting only of which the Surrogate's Court has complete jurisdiction. (3) That the payments and written promises of George W. Meyer were ineffective to prevent the running of the statute, first because made by him personally and not as executor, and second because as he had no authority to administer John N. Meyer's estate he was powerless to make such payments from estate funds, and any unauthorized payments by him could not remove the bar of the statute.

1. I see no reason to change my determination as to the power of sale. In my opinion it is imperative. I have examined numerous authorities, including many not cited upon the briefs, and I find none where the will construed was like that of John N. Meyer. It seems to me that where, as in this case, there is a direction in the will to pay debts coupled with a power of sale in the executrix, who is also the sole devisee and legatee, effect must be given both to the direction to pay debts and the power of sale. No power of sale was necessary or requisite in order to vest in Sophie Meyer, the sole devisee, the full beneficial enjoyment of the estate. Unless, therefore, it had relation to the payment of debts by the executrix, it was idle and meaningless. No such result should be reached by construction. On the contrary, the will should be construed as a whole so as to give effect to all of its provisions. It was competent for the testator to devote the proceeds of sales of the real estate to the payment of debts, if he so desired, and the language of the will is appropriate to that end. I do not deem that it was incumbent upon the plaintiff to show an insuf-

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ficiency of personalty for the payment of debts. While such proof might tend to strengthen the conclusion I have reached, it becomes unnecessary where the language of the will is clear and unambiguous and the purpose and intention of the testator can be clearly gathered from its provisions.

2. The jurisdiction of this court and of the Surrogate's Court as to accounting by executors is concurrent, and ordinarily this court will not entertain jurisdiction except where special circumstances require its exercise in order to afford complete relief. In my opinion such special circumstances exist in this case *first,* because the Surrogate's Court cannot compel the exercise of the power of sale; and *second,* irrespective of that question, the surrogate would have no jurisdiction in an accounting proceeding to try or determine the validity of plaintiff's claim. *Matter of Gall,* 182 N. Y. 270, 278; *Clark* v. *Hyland,* 88 App. Div. 392.

3. The question as to the effect of the payments and written promises to pay made by George W. Meyer as executor of Sophie Meyer and of his authority to make them upon the Statute of Limitations is one of considerable difficulty, but the doubt, in my opinion, should be resolved in favor of the plaintiff. While it is true that at the time these payments were made the executor could not administer John N. Meyer's estate, but could only be required to account and pay the fund over to the representative of his estate appointed by the Surrogate's Court, I do not think that this is conclusive against his right to so act as to prevent the running of the statute. I still think that where the right of action for an accounting was against him as executor, he could, so far as the question of the Statute of Limitations is concerned, prevent its bar by making the payments and the written promises,

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which he did. At the time such payments were made the statute had not run. They were made to one clearly entitled to such payments from the funds of the estate. If he had paid the entire claim at that time, it is inconceivable as a principle of law or equity that the legatees and devisees entitled to the estate could have prevented its allowance. But that is the logical effect of defendant's contention. These payments were not made by him personally, but as executor from the funds of the estate, as the letters in evidence clearly show. He was under a duty and obligation to account for John N. Meyer's estate. Under the statute as it then existed he could only be compelled to pay the fund into court or to Sophie Meyer's successor, but if in order to prevent or delay legal action he chose to make payments on account, and written promises to pay, to one who would be ultimately entitled to share in the estate, he will not be heard to assert that such payments and promises were unauthorized, nor permitted to interpose the statute as a bar.

Judgment accordingly.

FRANCIS GILBERT, as Assignee of ALESSANDRO BOLOGNESI and ALDO BOLOGNESI, Formerly Doing Business as A. BOLOGNESI & COMPANY, Plaintiff, *v.* THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK, Defendant.

(Supreme Court, New York Special Term, May, 1916.)

Bankruptcy — trustee in — action against creditor of bankrupt — assignment for benefit of creditors — offset.

An action against a creditor of a bankrupt for debt cannot be maintained either by his assignee for the benefit of creditors or by his trustee in bankruptcy in the name of such assignee.

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Where such an action was brought by the assignee for the benefit of creditors it may not be continued by the trustee in bankruptcy in the name of the plaintiff on the theory that defendant would have no right to offset a debt due it from the bankrupt and exceeding the amount of plaintiff's claim, whereas if an action were brought by the trustee in bankruptcy defendant would have the right to make such offset.

MOTION for judgment on the pleadings.

Olcott, Gruber, Bonynge & McManus, for plaintiff.

Frank M. Patterson, for defendant.

GIEGERICH, J. The trustees in bankruptcy did not take title through the plaintiff as assignee for the benefit of creditors of A. Bolognesi & Co., but took by a superior title (Black Law & Prac. of Bankruptcy, § 440; *Whittlesey* v. *Becker & Co.*, 142 App. Div. 313); hence section 756 of the Code of Civil Procedure has no application and the action cannot be maintained either by the plaintiff, who no longer has title, or by the trustees in his name, for no title has been transferred from him to them. I cannot see that section 67 of the Bankruptcy Act has any application to the case. The plaintiff did not procure any lien upon the fund in question either by the assignment or by the institution of this action. If he had procured any lien perhaps the trustees could have been subrogated to it, but it would not follow that they were authorized to continue the present action for the purpose of enforcing their rights. Counsel for plaintiff frankly states that the present action is sought to be continued by the trustees of the bankrupt estate in the name of the plaintiff on the theory that the defendant would then have no right to offset a debt due it from the plaintiff's assignors and exceeding the amount of the plain-

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tiff's claim, whereas if an action were brought by the trustees in bankruptcy the defendant would, under the Bankruptcy Act, have the right to make this offset. It would be regrettable if by such a device a debtor's estate, thrown into bankruptcy by virtue of the act enacted for that very purpose, could be administered in defiance of the equitable provisions of the act relating to offsets. In other words, it would be strange, not to say unconscionable, if the creditors of the bankrupt could avail themselves of the benefits of the act while refusing to recognize the right of offset given by the act itself to one of their number and insist that he must pay his debt to the bankrupt in full and claim against the estate, not for the balance due him, but for the full amount of his independent claim. Motion for judgment on the pleadings dismissing the complaint granted, with ten dollars costs.

Motion granted, with ten dollars costs.

THE CITY OF NEW YORK, Plaintiff, *v.* FIFTH AVENUE COACH COMPANY, Defendant.

(Supreme Court, New York Special Term, May, 1916.)

Transportation Corporations Law, § 23 — receipts from operation — subject to license fee.

Moneys received by a coach company from the leasing of space in its stages for advertising purposes are receipts from the operation of its routes within the meaning of section 23 of the Transportation Corporations Law and hence subject to the license fee therein provided upon gross receipts from such operation.

DEMURRER to complaint on the ground that it does not state facts sufficient to constitute a cause of action.

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William H. Page, for demurrant.

Lamar Hardy, corporation counsel (Josiah H. Stover and Harold N. Whitehouse, of counsel), opposed.

GIEGERICH, J. The action is to recover 5 per cent of the defendant's receipts for six years last past from the display advertising matter in its stages, and defendant demurs. The only question argued is whether moneys received by the defendant from the leasing of space in its stages for advertising purposes are receipts from the operation of its routes within the meaning of the statute (Trans. Corp. Law, § 23), and hence subject to the license fee of 5 per cent per annum upon gross receipts from such operation required to be paid to the city by the statute. It seems to me that the answer to the question is too plain to justify much discussion about it, but counsel for the defendant submits a long argument in which he mainly relies upon the cases of *City of New York* v. *Twenty-third Street R. Co.*, 113 N. Y. 311, and *City of New York* v. *Thirty-fourth St. Crosstown Co.*, 137 App. Div. 664, and claims they were conclusive of the question and in his favor. In the first of these cases the lessee of the railroad was sued and was held liable for the license fee upon receipts from operation because it and not the lessor was operating the road. In the second case the lessor was sued and was held not liable because not operating. Neither decision involved the present question, nor any other remotely resembling it. The question in both cases was who should pay, and not how much should be paid. The statement in the *Twenty-third Street* case that the gross receipts meant fares was coupled with the statement that the road could have no other receipts. In the present case the stage

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line has other receipts. The similar statement in the *Thirty-fourth Street* case that the words "gross receipts" mean "receipts from the operation of the railroad, i. e., fares," simply meant that the gross receipts mentioned in the statute did not refer to rentals received by the lessor, which was not operating the road, but to the moneys directly received by the operating company and derived from operation. While the moneys in question were not derived from the transportation of passengers, I am at a loss to see how it can be questioned that they were receipts from the operation of the stage routes. Certainly the moneys were not earned and could not have been earned by keeping the stages idle. They had to be operated in order to earn the money, for it was only by operating them that the advertising space became of any value to anybody. The contention that moneys so earned are not earned from the operation of the line must rest upon some refinement of reasoning which I am wholly unable to grasp. The defendant further argues that the parties have, by a long continued practical construction, settled their respective rights under the statute adversely to the plaintiff's contentions in the present case. But even if the case were doubtful and the practical construction of the city officials were entitled to consideration in determining the city's rights under the statute, it is not explained how such practical construction contrary to the present claim is apparent from the complaint.

Demurrer overruled, with costs, with leave to defendant to withdraw demurrer and answer within twenty days, upon payment of costs.

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LYDIA M. PURDY, Plaintiff, *v.* ELVIRA PURDY, JENNIE A. MAPES, ELVIRA SINCLAIR, GUY DALY, JAMES E. PURDY, ARTHUR PURDY, IRENE TRIMBEL, ORVILLE PURDY, CHARLES PURDY and JOHN DOE, RICHARD ROE and JANE DOE, Children of GEORGE PURDY, Deceased, the Said Names Being Fictitious, the Real Names of Said Defendants Being Unknown to Plaintiff, et al., Defendants.

(Supreme Court, New York Special Term, May, 1916.)

Dower — action for — pleading — husband and wife — contracts.

Where it does not appear from the pleadings in an action for dower that there was any trust in the lands in favor of plaintiff's deceased husband, and it is clear that he had neither the actual seizin of the property nor a legal right to actual seizin during coverture, a motion for judgment on the pleadings made by defendant must be granted.

Where the answer of one of the defendants after reaffirming the allegations of the complaint alleges an agreement between herself and the deceased husband of plaintiff whereby, in consideration of certain services alleged to have been rendered by her to said deceased husband, he agreed to leave to her whatever interest in the property he was entitled to at the time of his death, such agreement cannot be enforced in the present action; said defendant's remedy, if any, is by an action for breach of contract.

MOTION for judgment on the pleadings.

Robert S. Conklin, for plaintiff.

George H. Corey, for defendant Elvira Purdy.

H. A. Vieu, for defendants Jennie A. Mapes and Guy Daly.

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NEWBURGER, J. Motion for judgment on the pleadings. The complaint alleges that the plaintiff is the widow of Elijah F. Purdy, who died on the 8th day of November, 1914, intestate, and that letters of administration were granted to plaintiff; that said Elijah F. Purdy died seized and possessed of certain real estate in the borough of Manhattan; that on information and belief said seizin and possession existed by reason of the following: That prior to the year 1868 Elijah Purdy, the father of the said Elijah F. Purdy, plaintiff's deceased husband, died seized and possessed of certain parcels of real estate; that thereupon the said Elijah F. Purdy and his sister, the defendant Elvira Purdy, became possessed of an interest therein as heirs of their father; that on the 19th day of December, 1868, the defendant Elvira Purdy commenced an action for the partition of the property of Elijah Purdy; that while said action was pending, and on or about October 5, 1869, the said Elijah F. Purdy conveyed to the defendant Elvira Purdy all his right, title and interest in the real estate of Elijah Purdy, deceased, which deed was recorded in Liber 1114 of Conveyances, page 537, on December 27, 1869; that said conveyance was without consideration, as the said Elijah F. Purdy did not desire to hold any real property in his name, but desired said property to be held in trust by his sister for his benefit; that subsequently a decree was entered in said partition suit in which it was adjudged that said Elvira Purdy was the owner of one-seventh of said real estate as an heir and one-seventh as grantee of her brother; that the said property was sold by the referee appointed for that purpose to one Jacob Miles, who subsequently conveyed the same to Elvira Purdy. The complaint further alleges that although the referee's report recites that said parcels were sold for a certain sum of money, and

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the deed from Miles to Elvira Purdy recites a consideration, no money really passed, the said conveyances being a matter of form; that the said Elvira Purdy took said parcel in furtherance of the scheme to hold same for the benefit of Elijah F. Purdy; that he did receive the income of the property during his lifetime and was recognized as the owner by Elvira Purdy. The answer of the defendant Elvira Purdy admits the source of her title, but denies the existence of a trust in favor of her brother, and alleges that the plaintiff did not marry her brother until many years after the conveyance to the defendant; that the said Elijah F. Purdy appeared in the partition suit, and that the final decree was entered on the 23d day of May, 1871, approving the referee's report of sale and ordering a distribution of the proceeds of the sale. The answer further alleges that the defendant Elvira Purdy never executed any instrument whereby any interest in the deceased husband of the plaintiff was created or conveyed. By order of the court the plaintiff served a reply wherein she admits that she was not married to her deceased husband until long after he had conveyed his interest in his father's estate to his sister. As to the partition suit, she denies that she has any knowledge or information sufficient to form a belief, and denies that it was adjudged that Elvira Purdy owned the two-sevenths interest in her father's estate in her own right, and avers that she has no knowledge or information sufficient to form a belief as to the allegation that defendant never executed a writing whereby was created or conveyed any interest in Elijah F. Purdy in the premises. The answer of Jennie A. Mapes, after reaffirming the allegations of the complaint, alleges an agreement between herself and the deceased husband of the plaintiff whereby, in consideration of certain services alleged to have been rendered by said

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Mapes to the said Elijah F. Purdy, he agreed to leave to her whatever interest he was seized and entitled to in the premises at the time of his death, and asking that it be decreed that she is entitled to the premises in question. It will thus be seen that the plaintiff claims dower in certain lands owned by her deceased husband prior to his marriage to her. To entitle the wife to dower the husband must be seized either in fact or in law of a present freehold in the premises, as well as of an estate of inheritance. As was said by Mr. Justice Gray in *Phelps* v. *Phelps*, 143 N. Y. 202: "The position of a wife, with respect to her husband's property, is limited by the Revised Statutes, and unless she can bring herself within their limitations, she is without the right to assert any claim to it. Concededly, in this case, the husband was never seized of the property in question, and the agreement set forth, and which is claimed to confer upon him its real ownership, could create no interest or right to possession. If it were possible to assume a right in Phelps, based upon the agreement, to maintain an action for the reconveyance by Lewis to himself of the lands, such an assumption clearly negatives any idea of the existence of a legal estate in Phelps. We may assume, as it is alleged, that he was to receive the benefits arising from the lands; but if there was a beneficial use, it must be united with a right to the possession (a right which is not alleged here), before we can perceive the existence of any estate, upon which a claim of dower may be impressed." See, also, *Nichols* v. *Park*, 78 App. Div. 95; Real Prop. Law, § 190. The case of *Lugar* v. *Lugar*, 160 App. Div. 807, is cited and relied on by plaintiff. In that case Livermore, in whose name title was taken orally, agreed to hold the same for the benefit of the parties that might be named by Lugar in his will. On the trial of the action Livermore

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appeared, and the trial court passed upon the amounts received and disbursed by Livermore, and the court decreed that Livermore held the premises in trust pursuant to agreement, and upon his being reimbursed for advances made by him he convey the premises to the parties named in the will; and Mr. Justice Hotchkiss said, at page 809: "Inasmuch as Livermore does not appeal, it must be presumed that he does not dispute the alleged trust agreement, and that he never has disputed it, the latter presumption being strengthened by the fact that the findings of the trial court show that, in the course of his administration, he has collected upwards of $33,000 from rents, and has paid to the defendant Marion and her deceased mother, Mary, upwards of $7,500, and to the plaintiff and her deceased father, Charles, upwards of $4,500. Conceding for the argument that the oral agreement was void to the extent that no trust resulted in favor of Henry or his heirs or devisees (3 R. S. [5th ed.,] 15, § 51; R. S. pt. 2, chap. 1, tit. 2, art. 2, § 51; 1 R. S. 728, § 51), nevertheless, I know of no law which prevented Livermore from treating it as valid and accepting and performing its duties, and when he has come into court and has given his express consent to recognize and adopt the agreement, has accounted for the moneys coming into his hands, and has failed to appeal from the court's decree charging him with a trust, passing his accounts, establishing his equities and the equities of those interested in the land or its net proceeds, and directing him to convey to the owners of the fee, on proper tender made, it seems to me that we have the relations of the parties from the day of the deed to this date as firmly and solemnly established as they could have been had they been expressed by formal instrument executed cotemporaneously with the deed. So expressed, the instrument would have been enforci-

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ble." It will be thus seen that the conduct of the trustee in *Lugar* v. *Lugar* was entirely different from the situation presented in this case. There is absolutely no allegation in the complaint herein that would warrant this court in assuming that a trust existed in favor of plaintiff's deceased husband, and it is clear that he had neither the actual seizin of this property nor a legal right to actual seizin during coverture. As to the answer interposed by the defendant Jennie A. Mapes, if there was such an agreement between her and Elijah F. Purdy, as she alleges, she has her remedy by an action to recover damages for a breach of contract; it cannot be enforced in this action. The motion must be granted.

Motion granted.

MAYBELLE D. GOUERT, Plaintiff, *v.* THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK, JOSEPH H. STOPPANI and WALTER B. HOTCHKIN, Individually and Composing the Firm of STOPPANI & HOTCHKIN, ABRAHAM S. GILBERT, as Trustee in Bankruptcy of JOSEPH H. STOPPANI and WALTER B. HOTCHKIN, Individually and Composing the Firm of STOPPANI & HOTCHKIN, and WILLIAM P. FISHER, Defendants.

(Supreme Court, New York Special Term, May, 1916.)

Banks — determining title to assets remaining in — bonds — actions — contracts.

Where negotiable bonds, loaned to a firm of stockbrokers for the purpose of being shown as part of its assets, were immediately hypothecated by it with its bank to secure its indebtedness, and the bonds were sold by the bank under a collateral agreement before notice from the owner who was not indebted to the

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stockbrokers, said owner, though not a party to an action against the bank by a customer of the stockbrokers, is bound by a decree therein made determining the title to the assets remaining in the hands of the bank under the collateral agreement.

ACTION to marshal the assets of Stoppani & Hotchkin.

House, Grossman & Vorhaus, for plaintiff.

Frank M. Patterson, for the Mechanics & Metals National Bank.

Leon Lauterstein, for defendant Gilbert.

William P. Fisher, in person.

NEWBURGER, J. In February, 1910, the defendants Stoppani & Hotchkin executed a general collateral agreement with the defendant the Mechanics and Metals National Bank whereby the said firm agreed from time to time to deposit certain securities as collateral for loans to be made to them by the bank. The firm from time to time borrowed certain sums of money and deposited certain bonds and stocks as collateral security. On the 18th day of May, 1914, the firm of Stoppani & Hotchkin failed, and made a general assignment to Abraham S. Gilbert for the benefit of their creditors, and at which time they were indebted to the Mechanics and Metals National Bank in the sum of $49,000, and had pledged with said bank certain bonds and stocks. Subsequently, and pursuant to said collateral agreement, the bank disposed of all of the securities with the exception of 100 shares North American Company stock and 100 shares American Smelting and Refining Company stock, and applied the proceeds toward the indebtedness of the firm, but there

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remained and still remains due to the bank the sum of $6,435.92 and interest. The defendant Fisher carried with the defendants Stoppani & Hotchkin a speculative account upon which he was indebted in the sum of $6,639.04, and to secure which the said firm held certain securities, including the shares of the American Smelting and Refining Company heretofore referred to as having been hypothecated with the defendant bank by Stoppani & Hotchkin under the collateral agreement. Upon the 24th day of February, 1914, the plaintiff loaned to Stoppani & Hotchkin $4,000 par value city of New York fours and $6,000 par value U. S. Steel Sinking Fund five per cent bonds, upon the representation and understanding that they might be shown together with the assets of the firm to a committee of the Stock Exchange, who were about to examine the books of said firm of Stoppani & Hotchkin. Plaintiff was not indebted to said firm, nor did she have any account with them. Immediately upon obtaining said securities from plaintiff, Stoppani & Hotchkin delivered the same to the Mechanics and Metals National Bank to secure their indebtedness, and subsequently they were sold by the bank on May 26, 1914, under the collateral loan agreement. On the 3d day of June, 1914, plaintiff served a written notice on the bank of her ownership, and demand for her securities. In an action brought by the defendant Fisher against the Mechanics and Metals National Bank, it was decreed that the defendant bank may liquidate the balance due on its loan to Stoppani & Hotchkin out of the 100 shares of the North American stock and the 100 shares of the American Smelting and Refining Company stock, and after liquidation to pay over any surplus to William P. Fisher, and also awarding judgment in favor of said Fisher against Stoppani & Hotchkin in the sum of $13,335.32, with interest, and further directing that

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upon the payment by Fisher to said bank of the sum of $6,435.92 and interest, the North American Company and American Smelting and Refining Company stock should be delivered to said Fisher. This action is now brought to marshal the assets of Stoppani & Hotchkin. An examination of the record in *Fisher* v. *Mechanics and Metals National Bank* and the opinion of Mr. Justice Shearn (89 Misc. Rep. 587) leads to but one conclusion: that whatever assets of Stoppani & Hotchkin remain in the hands of the bank under the collateral agreement are disposed of by the decree in that action. It is conceded by plaintiff herein that the assets that she desires to impress with her claim are those referred to in the judgment of Fisher against the Mechanics and Metals National Bank. While it is true that the plaintiff was not a party to the Fisher suit, yet this court having determined the title to the assets remaining in the hands of the bank disposes of plaintiff's claim thereto.

Complaint dismissed, but without costs.

EDMUND F. HARDING, Plaintiff, *v.* WILLIAM D. GAILLARD, Individually and as Assignee for the Benefit of Creditors of the Firm of BEERS & OWENS, Impleaded with CHARLES H. DICKINSON, as Sole Surviving Partner of BEERS & OWENS, Defendants.

(Supreme Court, New York Special Term, May, 1916.)

Assignment for benefit of creditors — duties of assignee — when plaintiff estopped from seeking additional damages — replevin.

A brokerage firm, at the time of the making of a general assignment for the benefit of its creditors, held certain corporate stock for plaintiff's debit balance which he was ready and willing to pay but the assignee claimed a lien thereon.

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Upon petition of plaintiff for the delivery of the stock to him upon payment of the debit balance an order was granted for the relief asked for upon payment of the amount of the claimed liens, but on appeal from said order the court as a condition of the surrender of the stock to plaintiff fixed the amount of his debit balance as the sum to be paid by him. Held, that having replevied the shares of stock and paid the balance due to the assignee of the brokerage firm plaintiff was estopped from seeking additional damages measured by the difference in the value of said stock between his demand therefor and the delivery thereof by the assignee pursuant to the order of the court.

MOTION for judgment.

Dos Passos Brothers, for plaintiff.

Marsh & Wever, for defendant Gaillard.

NEWBURGER, J. The complaint alleges that in 1915 John W. Beers and the defendant Dickinson were co-partners doing business as stockbrokers under the name of Beers & Owens, and that on the 8th day of September, 1915, Beers died, and the defendant, as sole survivor of the partnership, made a general assignment for the benefit of creditors to the defendant Gaillard; that the plaintiff was the owner of 300 shares of the common stock of the Interborough Metropolitan Company, which stock was held by the brokerage firm for the plaintiff's debit balance, and under the assignment came into the possession of defendant Gaillard; that at the time of the assignment plaintiff was indebted to said firm on said debit balance in the sum of $1,006.95, with interest, which plaintiff was ready, able and willing to pay, but defendants claimed a lien thereon amounting to $3,806.95; that said stock was returned on the 9th day of February, 1916, upon payment by plaintiff to the defendants of the sum of

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$1,006.95. The plaintiff further alleges that on the 26th day of October, 1915 (being the day when he claims to have offered to take up said stock), the stock was reasonably worth $6,787.50; that on the 9th day of February, 1916, the day of delivery, it was worth $5,250, and for the difference in the value this action is brought, plaintiff claiming the same to represent his damages. The answer alleges that certain questions arose as to the power of Gaillard, as assignee, to deliver the stock to the plaintiff; that thereupon the plaintiff herein by petition applied to this court for an order directing the defendant Gaillard, as assignee, to deliver to the petitioner (plaintiff herein) the 300 shares of Interborough Metropolitan Company upon payment to the assignee of the debit balance of $1,006.95; that proceedings were had upon said petition which resulted in the entry of an order granting said petition upon payment of $3,806.95; that an appeal was taken by plaintiff which resulted in the Appellate Division fixing the amount to be paid by plaintiff as a condition of the surrender of the stock to him of $1,006.95 (171 App. Div. 486); that immediately after the entry of the order of the Appellate Division the plaintiff paid the amount fixed by the order and received the stock from the assignee. This case comes clearly within the ruling by the Court of Appeals in the case of *Commerce Exchange Natl. Bank* v. *Blye*, 123 N. Y. 132. In that case it appeared the defendant became receiver of a bank, and among the assets found certain bonds which the plaintiff claimed, but was refused, whereupon he commenced an action in replevin, in which action plaintiff was awarded possession of the bonds and damages for their detention; that the defendant appealed from the judgment, which subsequently was affirmed. The plaintiff then brought an action to

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recover damages for the failure to deliver said bonds. The defendant then demurred, and Mr. Justice Finch said, at page 134: "The judgment rendered in this case is without precedent, and opens new possibilities of litigation if sustained by this court." And at page 135 he says: "The complaint discloses a single tort, which has formed the subject of an action and been redressed by a judgment therein. It alleges no new or separate demand, but simply a continuance of the refusal to obey it, after judgment and pending the appeals therefrom. If the defendant's continued possession during that interval was a wrong at all, it was not new or separate, but a continuance of that sued upon, and dependent upon the demand proved in that action. At the most, the complaint shows an extension of the damages beyond the date of the trial judgment, and growing out of the delay inseparable from the defendant's right of appeal, and so we are required to say, if we affirm this judgment, either that the damages flowing from a single wrong may be divided into two parts, and each part form the subject of a separate action, or that the exercise by the defendant of the right of appeal upon the precise terms and conditions dictated by the law constitutes a new and illegal detention of the property in controversy." On page 136 he says: "The appeals were taken by the defendant in pursuance of a lawful right and in performance of a clear duty. No question of his good faith is raised, and the damages claimed were caused by no act of his. Appointed receiver of the bank, he found these bonds among the assets, and took them into his possession lawfully and as his duty was. When the plaintiff made his demand the receiver was justified in resisting it in behalf of those whom he represented, and in submitting the controversy to the determination of the courts. The bonds were of course

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liable to fluctuations in value, and having that fact in mind the plaintiff deliberately selected his remedy. He might have sued simply for the conversion of the bonds and recovered their value and damages for their detention, and so have thrown upon the defendant their ownership after judgment and the risk of future depreciation incidental to that ownership. Instead of that he chose to pursue the bonds themselves and seek their recovery under the provisions of the Code." When the plaintiff herein filed his petition he chose his remedy, and the court having fixed the amount due by plaintiff on the stock, and plaintiff having acquiesced in the decision by payment of the amount fixed by the order of the Appellate Division and accepted the stock is estopped from seeking additional damages. The motion for judgment must be denied.

Motion denied.

UNITED STATES TRUST COMPANY OF NEW YORK, Plaintiff, *v.* ALFRED W. KIDDLE, Individually and as Administrator of the Estate of HENRIETTA CHAPPELL, Deceased, and Others, Defendants.

(Supreme Court, New York Special Term, May, 1916.)

Trusts — creation of, by deed — power of sale — executors and administrators — trustees — equitable conversion.

Lunatics — when judgment against, is void — jurisdiction — incompetent persons.

Where by a trust deed conveying both real and personal property the income of the estate is to be paid to the creator of the trust during her lifetime and upon her death the estate to be delivered to her administrator, the personal property of the estate upon the death of the beneficiary should be turned over to her administrator who before said property is turned over to him should be required to file a further bond in a sum to be fixed by the decree.

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Any charges arising from or growing out of the real property covered by said deed of trust and falling due after the death of the beneficiary should be paid from the proceeds of the real property under the discretionary power stated in the deed.

The expenses of closing out the trust estate composed of real property including the trustee's commission should be paid out of the proceeds of the sale of the real property.

Whether the issue of deceased cousins of the beneficiary are entitled to share in the remainder of the trust estate is a question that should be left for determination by the Surrogate's Court upon the accounting by the administrator.

As by the deed of trust the trustee was given a power of sale which survived the life beneficiary it created such an express trust of the power and authority of the trustee as to constitute an equitable conversion of the realty into personalty.

A judgment rendered against one committed by an order of the court to an institution for the insane is void for lack of jurisdiction where no committee of the person and property and no guardian had been appointed, and a mere order permitting service on a third person is not sufficiently broad to enable him to look after the interests of the incompetent.

ACTION for the construction of a deed of trust.

Stewart & Shearer, for plaintiff.

Gilbert, Lauterstein & Gilbert, for Alfred W. Kiddle et al.

Rounds, Schurman & Dwight, for Annie Kiddle et al.

John E. O'Brien, for Christopher Musgrave.

MacDonald DeWitt, for Frank Gerrard.

Andrew H. Scoble, for defendant Miriam C. G. Varian.

William Klein, guardian ad litem for the infant defendant Dorothy Bradley Kiddle.

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NEWBURGER, J. The complaint alleges that on the 9th day of April, 1912, Henrietta Chappell executed two deeds of trust whereby she conveyed to the plaintiff all her property, both real and personal, to hold in trust for the uses and purposes therein specified, among other things, to collect and receive interest, income and profits during the lifetime of the said Henrietta Chappell, and to sell in its discretion the property transferred, and to invest and reinvest the same or the proceeds of the sale or any part thereof in such form as the trustee may deem best and in securities permitted by the laws of the state of New York for the investment of the funds of savings banks, and the trustee shall be reimbursed for all expenses and charges in the execution of the trust, and upon the death of the said Henrietta Chappell the trustee is to deliver to her executor or administrator the said trust estate, less all payments, costs, expenses and charges reasonably incident thereto; that thereafter the said Henrietta Chappell was committed to an institution for the insane, where she died July 20, 1915; that while so confined the defendant Musgrave instituted an action in the Municipal Court, although no committee of her person or property had been appointed, and that no payment thereunder was made by the plaintiff on the ground that said execution was invalid, and therefore the plaintiff asks the aid and instruction of the court on the following questions: (1) Whether the remainder of the trust created by said Henrietta Chappell by said deed of trust of personal property dated April 9, 1912, was vested in said Henrietta Chappell and should be turned over to the defendant Alfred W. Kiddle, as administrator of the estate of Henrietta Chappell, deceased, as a part of her estate, or whether said remainder vested in the next of kin of said Henrietta Chappell, deceased, sub-

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ject to the right of distribution of the administrator of her estate, or whether said remainder vested in the next of kin of said Henrietta Chappell, deceased, and should be distributed among them by the plaintiff herein. As to this question, I stated on the trial that the administrator of the estate of Henrietta Chappell was entitled to take the personal property. This view is now confirmed after a careful reading of the deed of trust set out in the complaint. (2) In the event that the assets constituting said remainder should be transferred to the said Alfred W. Kiddle, as administrator of the estate of said Henrietta Chappell, deceased, either as a part of her estate or merely for the purpose of distribution among the remaindermen, whether said transfers should be made to said administrator without the filing by him of a further bond or whether said transfers should be conditioned upon the filing of such additional bond as may be found to be required by law. As to this question, I am of the opinion that before any property be transferred to the administrator he should be required to file a further bond in the sum to be fixed by the decree. (3) Whether any charge arising from or growing out of the said real property and falling due subsequently to the death of said Henrietta Chappell or some portion thereof should be borne by said trust fund composed of personal property. Whether the expenses of closing out said trust estate composed of real property, including the trustee's commissions on principal or some portion thereof, should be paid from said trust fund composed of personal property. The expenses referred to should be paid out of the proceeds of the sale of the real property. (4) Whether the issue of deceased cousins of said Henrietta Chappell are entitled to share in said remainder as next of kin. This question I do not think this court is called upon to determine, but should

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be left to the surrogate to decide upon the accounting by the administrator. In the deed of trust the trustee was given a power of the sale which survived the life beneficiary. The language of the deed created an express trust of the power and authority of the trustee so as to constitute an equitable conversion of the realty into personalty. See *Matter of Earnshaw,* 196 N. Y. 330; *Lawrence* v. *Littlefield,* 215 id. 561. I therefore direct the trustee to sell the real estate and pay over the proceeds thereof to the administrator. As to the claim of the defendant Musgrave upon the judgment obtained by him in the Municipal Court, it is apparent from an examination of the record upon which the judgment is predicated that the court had absolutely no jurisdiction. Henrietta Chappell at the time of its entry was an incompetent, having been committed by an order of this court to an institution for the insane. No committee of the person and property and no guardian had been appointed. It is true that the Municipal Court justice directed service on a person, but no provision was made to guard the interest of the incompetent. As was said in *American Mortgage Co.* v. *Dewey,* 106 App. Div. 389, the Supreme Court has inherent power to protect interests of incompetents in addition to the power conferred by the Code of Civil Procedure, and where an order permitting service upon a third person is made it should be sufficiently broad to enable him to look after the interests of the incompetent. See, also, *Sporza* v. *German Savings Bank,* 192 N. Y. 14. Without attempting to pass upon the merits of Musgrave's claim, I find that the judgment obtained is void for lack of jurisdiction.

Ordered accordingly.

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ROBERT ADAMSON, as Fire Commissioner of the City of New York, Plaintiff, *v.* CARL SCHREINER, Defendant.

(Supreme Court, New York Trial Term, December, 1915.*)

Greater New York Charter, §§ 799, 800 — construction of — reinsurance.

Sections 799 and 800 of the Greater New York Charter (Laws of 1901, chap. 466) should be construed so as to require the agents of foreign insurance companies to pay the percentage provided for in said statute on all policies of reinsurance as well as on all policies of direct insurance.

ACTION for an accounting.

Lamar Hardy, corporation counsel (J. A. Stover, of counsel), for plaintiff.

William B. Ellison, for defendant.

COHALAN, J. Plaintiff, as fire commissioner of the city of New York, brings this action for an accounting against the defendant as the agent of the Munich Reinsurance Company, a foreign corporation. If the plaintiff should succeed the defendant would be required to account for all premiums which have been received by him or by any person for him or which have been agreed thus to be paid for any insurance against loss or injury by fire in the city and county of New York; and, further, he would be required to pay to the plaintiff the sum of $2 upon every $100 upon the amount of all such premiums which directly or indirectly have been received by him as such agent. The suit was instituted pursuant to sections 799 and 800 of chapter

* Received too late for insertion in proper place.— [REPR.

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466 of the Laws of 1901 (Greater New York Charter, as amended). The statute reads as follows: "Section 799. There shall be paid to the fire commissioner, as treasurer of the fire department, for the use and benefit of said fire department, on the first day of February, in each year, by every person who shall act in the city of New York, as agent for or on behalf of any individual or association of individuals, not incorporated by the laws of this state, to effect insurance against losses or injury by fire in the city of New York, although such individuals or association may be incorporated for that purpose by any other state or country, the sum of two dollars upon the hundred dollars, and at that rate upon the amount of all premiums which, during the year ending on the next preceding first day of September, shall have been received by such agent or person, or received by any other person for him, or shall have been agreed to be paid for any insurance against loss or injury by fire in the city effected, or agreed to be effected, or promised by him as such agent. Section 800. Every person who shall act in the city as agent as aforesaid shall, on the first day of February, in each year, render to the fire commissioner, as treasurer of the fire department, a just and true account, verified by his oath, of all such premiums which, during the year ending on the first day of September preceding, shall have been received by him, or by any person for him, or which shall have been agreed to be paid for any such insurance effected, or agreed to be effected, or promised by him." The plaintiff, under sections 808-812 of the charter, is directed to distribute the moneys collected by him from foreign insurance companies among "the Trustees of the Exempt Firemen's Benevolent Fund of the city of New York." The money is used for the benefit of firemen's homes and the widows and orphans of

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deceased firemen. It is the contention of the defendant (a) that the statute, practically construed, refers to insurers only and not to reinsurers; (b) that it does not by its terms apply to the agent of a reinsurance company and that it may not be amplified by implication; (c) that to construe the section of the charter in question as is contended for by the plaintiff would result in double taxation, and (d) that the defendant is not an agent within the meaning of the provision of the charter in question. The Munich Reinsurance Company has done a profitable business in the state of New York. In 1909 the company collected net premiums aggregating $590,000; in 1912 it collected net premiums aggregating $755,695, and it appears that the business done up to the commencement of the suit was constantly increasing. For the privilege of doing business in the city of New York it has paid nothing whatever to the city, and only one-half of one per cent of the premiums collected by it to the state. It would seem, therefore, that it has an unfair advantage over domestic companies, which pay one per cent to the state. The issues herein practically arise *de novo,* as the plaintiff and his predecessors have hitherto neglected to institute legal proceedings for the collection of the license fees provided in the statute to be paid by the agents of foreign insurance companies. That the state may impose stringent conditions upon foreign companies incident to the transaction within its limit of the business of insurance has long been the settled law of this state. *People* v. *Fire Assn. of Philadelphia,* 92 N. Y. 311. In that case the court said: "The State, having the power to exclude foreign corporations, determines to do so unless they will submit to certain conditions. It meets the applicant on the border, forbidding admission, as it has a right to do, except on condition that it will ful-

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fill all of the requirements of our statutes relating to foreign corporations, one of which is the very law here assailed. When the corporation comes in it agrees to the conditions. They become binding by its assent. The tax or license fee charged by the act of 1865 is one of these conditions. It is imposed as the price of permission to come within the jurisdiction and not as a tax upon one already within the jurisdiction. * * * This view of the case renders of no importance the argument founded on the word 'tax' and the distinction sought to be drawn between that and a license fee. Grant that it is properly denominated a tax, yet the payment of a specific tax may be imposed as a condition of assent to fire insurance within the State, and, as we have seen, has been so imposed by express and positive law." This statute has already been construed and its manifest purpose has been set forth in the case of *Fire Department* v. *Stanton*, 159 N. Y. 225. In that case the court said: "The obvious purpose of this legislation was to promote and to strengthen the development of domestic corporations, by removing the element of an unfair competition on the part of corporations, or associations, organized in other states and an additional politic purpose may have been in the direction of a promotion of the safety of the citizen in insuring." In another part of the well considered opinion may be read: "It may be observed that the statute imposes not exactly a tax, but a license fee, to be paid by those persons who as agents seek to build up the fire insurance business in the city of New York for principals who have not incorporated under the State law." The first objection of the defendant to be considered is whether or not the charter provision embraces the term "reinsurance" as well as the term "insurance." The section reads that the agent shall pay "for any insurance against loss or injury by fire

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in the city effected or agreed to be effected or promised by him as such agent." It would seem that the word "any" is sufficiently broad to take in every form of insurance against loss or injury by fire, especially since the term "reinsurance" is defined to be a contract that one insurer makes with another to protect the first from the risk he has already assumed. *People ex rel. Continental Ins. Co.* v. *Miller,* 177 N. Y. 521; *Imperial Fire Ins. Co.* v. *Coss County,* 151 U. S. 452; *Matter of Western Assur. Co.,* 68 Fed. Rep. 708; *Hone* v. *Mutual Safety Ins. Co.,* 1 Sanf. 139; *London Assur. Co.* v. *Thompson,* 170 N. Y. 99. In the case of *People ex rel. Continental Ins. Co.* v. *Miller, supra,* it is stated: "The word 'reinsurance' as used in the statute (Tax Law, sec. 187), in so far as it applies to the relator, refers to premiums received by it for reinsuring risks of other companies. The test here, the same as in the first question discussed, is the business done by the company in using the privileges for which the tax is imposed. When it causes its own risks to be reinsured by another company it is not, so far as the act is concerned, doing an insurance business, but when it reinsures the risks of other companies it is doing an insurance business and should, according to the statute, be taxed for the privilege." In that case it was held that the relator, a domestic fire insurance corporation, under section 178 of the Tax Law, was required to pay to the state one per cent per annum on the gross amount of the premiums collected, and that the sums paid to other companies for reinsuring its own risks should not be deducted from such amount. It has been further held in the case of *Hone* v. *Mutual Safety Ins. Co., supra,* as follows: "In this instance the word 'reinsure' has a definite meaning settled in the law for two centuries past, and having the same meaning in its ordinary and popular sense. It is equally

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effective with the word 'insure,' and it has been decided that 'insure' may be used in a policy of reinsurance with the same force and validity. * * * When the insurer for some reason finds it convenient that another shall bear either in whole or in part the liability to the insured which he has assumed, and agrees with another to assume the whole or part of his liability with reference to the insured, it is termed a contract of reinsurance." I am disposed to hold that the word "insurance" has no narrow or restrictive meaning, and that it takes in any form of fire insurance; to hold otherwise would be in effect to defeat the purpose of the statute. The defendant further claims that the section of the charter does not by its terms apply to the agent of a reinsurance company, and providing for a tax, as it does, that it may not be amplified by implication. But it has been held that the statute imposes not precisely a tax but a license fee, to be paid by those persons who as agents seek to build up the fire insurance business in the city of New York for principals who have not incorporated in this state. *Fire Dept.* v. *Stanton, supra.* Moreover, the statute should be construed with reference to the purpose of the legislature in enacting it; that purpose was to strengthen the development of domestic corporations engaging in the business of fire insurance in this state, and to remove therefrom unfair competition on the part of corporations or associations organized in other states. A statute is to be construed so as to give it an interpretation not inconsistent with the purposes of the act. *The Emily and the Caroline,* 9 Wheat., 381; *Hubbard* v. *Brainard,* 35 Conn. 563. Under section 187 of the Tax Law a domestic fire insurance company must pay to the state an annual tax of one per cent on all premiums of insurance and reinsurance, while foreign fire insurance companies pay to the state but five-tenths of one per cent on all premiums of insurance

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and reinsurance, in addition to all other fees, licenses or taxes imposed by that or any other law. If the defendant's contention be sound, that under the provisions of section 799 of the charter no tax or license fee is to be paid to the city of New York by the agents of foreign fire insurance companies on policies of reinsurance, the purpose of the statute would be defeated. It is significant that under section 187 of the Tax Law there is this provision: "The tax imposed by this section shall be in addition to all other fees, licenses or taxes imposed by this or any other law * * *." Nor would a construction of section 799 of the charter, as claimed by the defendant, result in double taxation. In *People* v. *Home Ins. Co.*, 92 N. Y. 328, it was held that the legislature may, in its discretion, impose unequal or double taxes. The court, at page 347, said: "In performing the duty of levying taxes for the support of government, State legislatures may, in the exercise of their undoubted power, impose double taxes or lay burdens beyond the financial capacity of the classes taxed, and however impolitic or unwise such a course would be, the courts have no right to interfere with the exercise of the legislative discretion (citing cases). Such questions properly belong to the legislative branch of the government, whose exclusive duty it is to apportion and impose the taxes required for the use of the government." Finally, with respect to the question of agency, I think, there is no doubt that the defendant was the agent of the Munich Reinsurance Company within the meaning of the statute. It reads: "The term 'agent' in this chapter shall include an acknowledged agent or surveyor or any other person who shall in any manner aid in transacting the insurance business of any insurance corporation not incorporated by the laws of the state, and any broker whose business, in whole or in part, is to negotiate for and

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place risks, deliver the policies covering the same and collect premiums therefor." In the case of *Fire Department* v. *Stanton, supra,* the defendant claimed that he was the general manager of the "American Lloyds" and that he did not effect or receive premiums. He claimed that they were effected through brokers, and the premiums therefor were paid to the underwriters. He was sued for a percentage of the premiums received by him under section 799 of the Greater New York Charter. In its opinion the court said: "But this objection is disposed of by the finding of the trial judge that the defendant acted as agent for the association of underwriters in question and received premiums for effecting insurance. This finding is not only justified by the evidence, but partly by the averment in the answer that 'as general manager and attorney in fact * * * he has received premiums of insurance effected on property in the city of New York.'" The defendant herein testified that he was the United States manager of the Munich Reinsurance Company and the sole representative of that company in the United States, except a board of trustees, who had nothing to do with the transaction of the general business of the company; that he maintained an office in the city of New York; that he negotiated with the representatives of direct insurance companies and agreed with them upon the terms that were placed in insurance contracts or treaties; that he signed them as manager; that he did many other acts which unquestionably indicate that he was the agent of the Munich Reinsurance Company, and effected policies of fire insurance in behalf of that company in the city of New York. I am satisfied, in conclusion, that the statute in question should be construed so as to require the agents of foreign fire insurance companies to pay the percentage provided on all policies of reinsurance as well

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as on all policies of direct insurance. By such construction the purposes of the act would be fulfilled and the intention of the legislature to discriminate against foreign companies would be established. Judgment for the plaintiff for an accounting, as demanded in the complaint.

Judgment for plaintiff.

LEOPOLD HELLINGER, Plaintiff, *v.* CITY OF NEW YORK, Defendant.

(Supreme Court, New York Special Term, May, 1916.)

Injunction — encroachments on building line — Greater New York Charter, § 50 — Code of Ordinances, § 238 — damages to easements of light, air and access.

Stone stairways of solid masonry leading to entrances of a building erected by the city of New York and extending about six feet beyond the building line of a street sixty-five feet wide violate not only section 50 of the Greater New York Charter, which provides that the city government shall have no power "to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk, except the temporary occupation thereof during the erection or repairing of a building on a lot opposite the same," but offend against section 238 of the Code of Ordinances of the city which permits ornamental projections, provided they do not extend "more than one-fifteenth part of the width of the street they are upon, nor in any case more than five feet beyond the building line," and an adjoining property owner will be granted a mandatory injunction requiring the city to remove from the sidewalk such obstruction.

On a claim for damages to easements of light, air and access plaintiff is not entitled to recover for a diminution in value of his premises based on the assumption that the nuisance is to continue forever and at the same time have judgment of abatement and removal of the nuisance, but his recovery should be

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limited to the loss of rentals sustained up to the commencement of the action with the right of successive actions of damages until the abatement of the nuisance.

APPLICATION for a mandatory injunction requiring the city of New York to remove from the sidewalk certain building encroachments and projections which it has erected.

Samuel Hellinger, for plaintiff.

Lamar Hardy (Charles V. Nellany, of counsel), for defendant.

DELEHANTY, J. This is an application for a mandatory injunction requiring the city of New York to remove from the sidewalk certain building encroachments and the projections which it has erected. The plaintiff also seeks to be compensated in damages, claiming that the structure in question interferes with the easements to his property of light, air and access.

Plaintiff owns two five-story tenements located at Nos. 350 and 352 East Fifty-fourth street, in the borough of Manhattan. The city owns the property adjoining on the westerly side, upon which it has erected a large public bath and gymnasium. In front of this building it has constructed four stone stairways leading to as many entrances, each of which extends about six feet from the building line. In width they practically stretch across the entire front of the structure. These stairways are of solid masonry, and offend against the city ordinance which requires that such stoops or stairways should have open backs or railings, and should be of no greater width than is necessary for convenient passageway to the building.

In addition to the stairways the city has erected four massive columns of stone and brick, each of which is

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forty-nine feet six inches in height. Along the tops of these are projecting caps and stonework extending six feet nine inches beyond the building line. Each column stands upon a stone base four feet four and one-half inches upon the highway.

The plaintiff has shown that the obstructions complained of have interfered with the use and enjoyment of his property, and that by reason thereof he has suffered a loss in rentals of his buildings, and that the value of his premises, with the standing encroachments of the city, is $6,000 less than they would be without them.

Section 50 of the charter of the city of New York provides that the local city government shall have no power "to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk, except the temporary occupation thereof during the erection or repairing of a building on a lot opposite the same."

Section 238 of the Code of Ordinances of the city of New York, offered in evidence by the defendant, permits ornamental projections, provided they do not extend "more than one-fifteenth part of the width of the street they are upon, nor in any case more than 5 feet beyond the building line." East Fifty-fourth street is sixty feet wide. This would entitle the city to extend its ornamental projections but four feet.

It is therefore apparent that these obstructions violate not only the provisions of the charter, made for the protection of the public in the use of its streets, but they even offend against the ordinance in question.

If the defendant were a private property holder there is no doubt but that it would have to remove these encroachments. *People ex rel. Browning, King & Co.*, v. *Stover*, 145 App. Div. 259, affd., 203 N. Y. 613; *Ackerman* v. *True*, 175 id. 353; *City of New York* v.

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Rice, 198 id. 124; *People ex rel. Cross Co.* v. *Ahern*, 124 App. Div. 840; *City of New York* v. *Knickerbocker Trust Co.*, 104 id. 223. They clearly invade the property rights of the plaintiff.

When East Fifty-fourth street was opened as a street it was opened for the unrestricted use of the public. Assessments were then levied upon the abutting property owners for costs and were paid upon the implied promise to them that the city would maintain this street in its integrity as a public highway. Easement of light, air and access from the street attached to their property, and neither the plaintiff nor any other adjoining owner could be deprived of them, in whole or in part, without due process of law. *McMillan* v. *Klaw & Erlanger*, 107 App. Div. 407; *Abendroth* v. *Manhattan R. Co.*, 122 N. Y. 1.

It is true that there are instances where the withdrawal of a portion of the street from the use of the general public has been permitted and even approved by the courts of this state. But in no case have they sanctioned a material invasion of the property rights of an abutting owner without just compensation. If he is to suffer for the good of the public he is entitled to compensation for his loss. Moreover, no invasion of the property rights of another is, in law, deemed trivial. *Roberts* v. *Sadler*, 104 N. Y. 229.

In *Ackerman* v. *True*, *supra*, the Court of Appeals said: "It is well established by the decisions of this court that interferences with public and common rights create a public nuisance, and when accompanied with special damage to the owner of lands give also a right of private action to such owner, and that a public nuisance as to the person who is specially injured thereby in the enjoyment or value of his lands becomes also a private nuisance * * * In the language of Blackstone, a private nuisance is 'anything done to

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the hurt and annoyance of the lands, tenements or hereditaments of another,' which embraces not a mere physical injury to the realty, but an injury to the owner or possessor as respects his dealing with, possessing or enjoying it, and that one erecting or maintaining such a nuisance is liable in an action at the suit of another who has sustained such special damages, and he may be restrained in equity from continuing the nuisance. *Adams* v. *Popham,* 76 N. Y. 410; *Francis* v. *Schoellkopf,* 53 id. 152; *Kavanagh* v. *Barber,* 131 id. 211, 213; *Wakeman* v. *Wilbur,* 147 id. 657, 663."

Cases analogous to the one at bar have also been maintained upon the theory of continuing trespass. In *Covert* v. *City of Brooklyn,* 13 App. Div. 188, 189, the court said that: "The fact that the defendant had authority of law for the erection of the aqueduct did not vest it with authority to trespass upon plaintiff's rights." It seems to me, therefore, that it is immaterial whether the obstructions be technically called a nuisance or a trespass. They constitute a wrongful interference with the plaintiff's right of property, and he is entitled to redress.

It is a well known fact that for over a hundred years and until a comparatively recent date the city authorities had acquiesced to a greater or less extent in the erection and maintenance of building projections upon the streets. In the early days when land was more or less plentiful and the streets were not traveled to a great extent, such encroachments upon the highway doubtless did not seriously interfere with the rights of the general public. Times have, however, brought about a new order of things. The population of the city has increased to enormous proportions, and is still rapidly growing. Many residential centres, including the best avenues of the city, have been and are being converted into business sections. Apartments

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and hotels housing hundreds of people are being erected on areas which heretofore were appropriated to the use of but a few.

These changed conditions have necessarily caused the city government of New York to adopt a policy of reclaiming for the public the use of its streets free from obstructions. The courts, as shown by a reference to the cases above cited, and the recent case of *Acme Realty Co.* v. *Schinasi,* 154 App. Div. 397; affd., 215 N. Y. 495, have upheld the city authorities in clearing the highways and keeping them clear of building projections. I see no reason why the city itself should be permitted to erect and maintain the very same obstructions and impediments that it prohibits its citizens from erecting or maintaining. There is no power given to it by the city charter to do so, but on the contrary it is prohibited therefrom by positive limitation. All the reasons advanced as to why a private property holder should not encroach upon the sidewalks apply with the same force to the obstructions erected by the city in the case at bar. It is true that the building in question is devoted to a sanitary and public use. There was, however, no necessity for constructing it beyond the building line to the annoyance of the traveling public and the damage of the adjoining property owner. The city could well have placed this mass of encroaching stone and masonry within the bounds of its premises instead of having so ill arranged it upon the sidewalk.

There are instances in the books where municipalities have been obliged to respond in damages by reason of the maintenance of an illegal structure (*Morton* v. *City of New York,* 140 N. Y. 207; *Covert* v. *City of Brooklyn, supra*), and courts have granted an injunction against corporations engaged in a public service where such corporations maintained a nuisance. *Story*

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v. *New York El. R. C.*, 90 N. Y. 122. No case has been cited in this jurisdiction or elsewhere where the city has been compelled to remove building encroachments from the sidewalk; nevertheless, I am satisfied that under well established principles of law and equity the facts in this case warrant the granting of an injunction as prayed for.

On the question of damages I take it that the plaintiff is not entitled, as claimed, to recover for a diminution in value of his premises based upon the assumption that the nuisance is to continue forever, and at the same time have judgment of abatement and removal of nuisance. I think his recovery should be limited in amount to what he has sustained in loss of rentals up to the commencement of the action, with the right of successive actions for his damages until the nuisance be abated. *Uline* v. *N. Y. C. & H. R. R. R. Co.*, 101 N. Y. 98; *Barrick* v. *Schifferdecker*, 123 id. 52; *Close* v. *Witbeck*, 126 App. Div. 544.

Ordered accordingly.

PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* MARY CLAFFY, Appellant, Tried with STELLA ULMER.

(Court of General Sessions of the Peace in and for the County of New York, May, 1916.)

Evidence — when statements of inmates of disorderly house admissible — criminal law — Tenement House Law, § 150.

On a charge of keeping and maintaining a house of prostitution in violation of section 150 of the Tenement House Law statements of the inmates made in the absence of defendant are admissible, not as tending to establish defendant's knowledge of the disorderly character of the house but as tending to prove it was, as a matter of fact, a house of prostitution.

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Statements of a codefendant, an employee of defendant, made in her presence and in the presence of the police officer who made the arrest, making a direct accusation against defendant, are admissible though she remained silent.

Evidence as to whether the premises were being conducted as a disorderly house to the knowledge of defendant considered, and held to present a question of fact and that the determination of the magistrate thereon in convicting defendant was not against the weight of evidence.

APPEAL from a judgment of the City Magistrate's Court, convicting the defendant of a violation of section 150 of the Tenement House Law, in that she kept and maintained a house of prostitution at No. 244 West Fifty-first street, a tenement house.

Goldberg & Busch (James E. Smith, of counsel), for appellant.

Edward Swann, district attorney, for the people.

NOTT, J. The defendant contends that the judgment should be reversed because of the improper reception of statements of inmates of the house made in the absence of the defendant, and certain statements of the codefendant Ulmer, who was tried with the defendant, some of which were made in the absence of the defendant and one in her presence.

The statements of the inmates of the house were clearly admissible, not as tending to establish defendant's knowledge of the disorderly character of the house, but as tending to prove that the premises were, as a matter of fact, carried on as a house of prostitution. As to the statements made by the defendant Ulmer in the absence of the defendant, they were clearly admissible against her (Ulmer) and their reception cannot be assigned as error.

The statement made by the defendant Ulmer in the

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defendant's presence was testified to as follows: The arresting officer testified that after arresting the defendant Ulmer the following took place: "The defendant Mary Claffy came in about half past five, and in the presence of the defendant Mary Claffy I said to Stella Ulmer — Mary Claffy first says to me, 'What's the meaning of this?' I says 'I am locking up your maid for running a disorderly house.' The maid said, 'I am doing nothing of the kind, I am only doing what you told me.' I says to Mrs. Claffy, 'Is that right?' The defendant Mary Claffy says to me, 'Why, no, I am not doing anything of the kind.' * * * The defendant Stella Ulmer said, 'Well, I am not going to get into trouble. I have been here for one year working for you and I have been giving you the money and I am not going to stand for this.' * * * 'Sometimes I get five dollars from the men; the girl gets three dollars and I give two dollars to her * * * If the man pays seven dollars, the girl gets four and I give three dollars to Mary Claffy. If the man pays ten dollars, the girl gets six dollars and I give four dollars of it to Mary Claffy.'" The defendant Stella Ulmer thereupon produced a book containing the names and addresses of various girls and stated that she made the inquiries by direction of the defendant Claffy. To this accusation the defendant Claffy remained silent.

While it is true that the appellate courts have restricted the use of statements made in the presence of the defendant, I am not aware of any case that has gone to the length of holding that where a direct accusation is made by the defendant's employee, as in the case at bar, an admission by silence cannot be proved. To hold thus under the circumstances here disclosed would be practically holding that an accusation made against the defendant and not denied could never be proved.

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The defendant further contends that no knowledge was proved on her part that the premises were being conducted as a disorderly house. I think, however, a clear question of fact was presented on that subject. The officer testified that when he was first admitted the defendant Claffy was present, asked who he was and was shown the card on which he was admitted. The defendant admitted that the premises were hers, her name was on the door bell and the cards used in the establishment bore her name. It appeared that she was in the premises at the same time when girls were present, clad in kimonos, and the evidence fails to show that she made any objection to their presence or made any inquiries as to what they were doing there. One of the officers also testified that when the defendant was in the patrol wagon with him, he inquired as to a former occasion on which she had been fined for maintaining a public nuisance and said: "Don't you think this ought to be a lesson to you? This is the third time to my knowledge." The defendant replied: "Never again, I am through with these kind of houses; no more for me."

In my opinion it was clearly a question for the magistrate on the proof to determine whether or not the defendant had knowledge, and his determination is not against the weight of evidence. The judgment therefore is affirmed.

Judgment affirmed.

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Matter of the Probate of the Last Will and Testament of ANN MCMULLEN, Deceased.

(Surrogate's Court, Erie County, May, 1916.)

Wills — revocation of prior wills.

A last will which makes a full and complete disposition of all of the property of testatrix amounts to a total revocation of any prior will and, therefore, need not contain a revocation clause.

PROCEEDING upon the probate of a will.

Kenefick, Cooke, Mitchell & Bass, for petitioner.

Edward N. Mills, for contestants.

HART, S. The decedent, Ann McMullen, made and executed a series of eight wills and codicils during a period from May 6, 1908, up to and including October 7, 1914. A petition for probate of the last will dated July fifteenth, and a codicil of October 7, 1914, were filed and citations regularly issued to the proper parties. Upon the return day of the citation, objections to the probate were filed by certain next of kin and legatees, who had received more favorable consideration in previous wills. A preliminary examination of the subscribing witnesses was had, and the testatrix's lawyer produced the six preceding wills and codicils prepared by him, which are on file as exhibits in the proceeding for probate. Objections to probate have been withdrawn by the contesting heirs who consent to the probate of the will and codicil, and petition this court for a construction whereby clause "Fifth" of the codicil of January 24, 1911, may be embodied

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and included as a part and portion of the last will and testament of the decedent.

The group of wills and codicils executed by the testatrix are not radical in their changes, but indicate a desire to modify bequests and legacies to relatives and charitable institutions under changing conditions.

The will offered for probate is carefully prepared and, while it contains no revocation clause, is divided into five articles and subdivisions, three of which articles contain a sequence of bequests, many of which are contained in the preceding instruments. Article fourth devises and bequeathes all the rest, residue and remainder of decedent's estate. Article fifth appoints an executor and defines his powers. The codicil, executed a few months later, modifies some of the bequests and republishes the will of July fifteenth in the following language:

"*Fourth.* I hereby declare said instrument made by me on said July 15th, 1914, for my last will and testament except so far as it does not contain the things provided for in this codicil, to be a declaration of the manner in which I wish to dispose of my property; and I hereby publish and declare said instrument made said July 15th, 1914, and this codicil, to be, together, my last will, using the said word " will " according to the definition thereof in Section 2768 of the Code of Civil Procedure of the State of New York, so as to signify said last will and testament and this codicil thereto."

The law is well established that a testator can leave but one last will, that a will can be modified by any number of codicils, all being of equal force, if not contradictory. But a will which makes a full and complete disposition of all the testator's property renders useless, and therefore amounts to a total revocation of, every prior will.

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I have examined the brief and cases cited by contestant wherein he seeks to have the legacy contained in the codicil of January 24, 1911, read into the last will. The plan proposed by contestant I believe would be in conflict with the intention of the testator, because of a complete disposition of the estate contained in the last will and codicil.

Decreed accordingly.

Matter of the Transfer Tax upon the Estate of JOHN G. WENDEL, Deceased.

(Surrogate's Court, Westchester County, May, 1916.)

Constitutional law — Tax Law, § 220 (6) — power of appointment — transfer tax — statutes.

Section 220 (6) of the Tax Law which declares: "whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will," is constitutional when the power of appointment is exercised by will, even though the transfer would not be subject to the tax except for the exercise of said power.

The question of the constitutionality of said statute, the power of appointment by deed and not by will not being entirely free from doubt, will be sustained on the ground that a statute should not be pronounced void by a court of first instance.

APPEAL by the state comptroller from an order assessing the transfer tax.

Francis A. Winslow, for state comptroller.

Burlock E. Rabell, for administratrices (respondents).

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Misc.] Surrogate's Court, Westchester County, May, 1916.

SAWYER, S. John G. Wendel died intestate on the 30th day of November, 1914, and letters of administration were duly issued upon his estate by the surrogate of Westchester county on the 30th day of January, 1915.

John D. Wendel, the father of the deceased intestate, died on November 24, 1876, leaving a last will and testament, wherein he devised certain real estate to his son John G. Wendel, for life, with power of appointment by deed or will to his lawful issue or to his sisters or their issue in such shares and for such estates and on such conditions as he might think fit.

The paragraph of said will containing such power of appointment is as follows:

"*Twenty-first:* To my son John G. Wendel I devise the southerly half of the block of ground lying between Broadway and Seventh Avenue and 38th and 39th Streets, that is to say eighteen lots of land known by the Ward Map numbers of the City as 4720, 4721, 4722 and 4723 on the west side of Broadway and 4723½, 4724, 4725, 4725½, 4726, 4727, 4727½, 4728, 4729 and 4729½ on the north side of West 38th Street and 1190, 1191, 1192 and 1193 on the East side of Seventh Avenue to have and to hold the said eighteen lots of land for and during his life the rents issues and profits I devote expressly to his own use and benefit, and I authorize him to appoint the said real estate to and amongst his lawful issue or to his sisters or their issue in such share and for such Estates and on such conditions as he may think fit by deed or by will, and in case he shall leave no such valid appointment I devise the said lots of land to his lawful issue and if he shall leave no such issue then to his sisters their heirs and assigns in fee simple forever."

Pursuant to such power of appointment, the donee, John G. Wendel, on or about the 23d day of January,

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1911, delivered to his sisters six certain deeds conveying to them the premises mentioned in the 21st paragraph of the will. He also conveyed to them by the same instruments his life interest in the premises in question.

The transfer tax appraiser has refused to tax said real estate in which the deceased had a life interest and which was transferred by him by deeds, pursuant to the power of appointment mentioned in the father's will.

The state comptroller now appeals, claiming that the real property thus transferred was taxable at the date of the death of the decedent herein.

Section 220, subdivision 6, of the Transfer Tax Law is as follows: "Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will."

This portion of the statute is in substance the same as the original one of 1897.

The act is constitutional, when the power of appointment is exercised by will, even though the transfer would not be subject to the tax except for the exercise of the power of appointment. *Matter of Vanderbilt*, 50 App. Div. 246; affd., 163 N. Y. 597; *Matter of Dows*, 167 id. 227; sustained, 183 U. S. 278; *sub nom. Orr* v. *Gilman*.

The facts in the *Vanderbilt* case were as follows: William H. Vanderbilt died in 1885, leaving a last will and testament. His son Cornelius was to receive the income for life of a certain trust fund. Upon his death

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the fund was to be paid to his lawful issue in such shares or proportions as Cornelius might by his last will and testament direct or appoint. Cornelius died leaving a last will and testament, and exercised the power of appointment mentioned in the will of his father. At the time of the death of William H. Vanderbilt this fund or the right to succession was not taxable under the Collateral Inheritance Tax Law. The court at page 252 held as follows: "If the right of succession to this fund was taxable, as we think it was, the Legislature had the power to declare that the tax should be imposed as of the time at which the right to possession of the amount appointed of the fund to each remainderman became fixed and determined by the exercise of the power of appointment. While the appointees take by relation back so as to derive their title under William H. Vanderbilt's will, they must take their specific shares in designated amounts from the time of the execution of the power, and, we think, that the authority of the State to impose a tax on the right of succession continued until the time at which the extent of that right was finally fixed by the exercise of the power of appointment.

"If the views above expressed are correct, then it is quite apparent that property has not been taken without due process of law, but only in the ordinary exercise of the right of the State to impose burdens upon the citizen by way of taxation."

If, then, John G. Wendel had exercised the power of appointment derived from his father's will by a last will and testament, clearly under the decision in the *Vanderbilt* case the property transferred to the appointees under the power would have been taxable.

In this case, however, the power of appointment was exercised by deed.

The question then which must be determined is:

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Where the power of appointment is exercised by deed and the transfer of the property would not be subject to the tax if it were not for the exercise of the power of appointment, is there a taxable transfer?

This question does not appear to have been passed upon in a reported case. The dictum in *Matter of Delano,* 176 N. Y. 486; sustained in 205 U. S. 466, *sub nom. Chanler* v. *Kesley,* raises a doubt as to the question, the Court of Appeals saying at page 494: "No tax is laid on the power, or on the property, or on the original disposition by deed, but simply upon the exercise of the power by will, as an effective transfer for the purposes of the act. *If the power had been exercised by deed,* a different question would have arisen, but it was exercised by will and owing to the full and complete control by the legislature of the making, the form and the substance of wills, it can impose a charge or tax for doing anything by will."

The United States Supreme Court, in reviewing the *Delano case, supra,* said at page 232: "The exercise of the power bestowing property in the present case was made by will, and we need not consider the case, expressly reserved by the Court of Appeals in its opinion, as to the result if it had been exercised by deed."

The question of the constitutionality of the statute under consideration, where the power of appointment is by deed and not by will, is an interesting one and not entirely free from doubt. *Matter of Delano, supra.* But I will sustain the law on the ground that a statute should not be pronounced void by a court of first instance. See *Matter of Hosack,* 39 Misc. Rep. 132.

We must determine, therefore, what, in our opinion, was the intention of the legislature, when it enacted section 220 of the Transfer Tax Law, in so far as the same may relate to the question herein presented.

There are six different subdivisions or classifications

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of taxable transfers mentioned in this section, and a tax is imposed upon the transfer of any property to persons or corporations in the following cases:

Under subdivisions 1, 2 and 3 where the transfer is by will or intestacy.

Under subdivision 4 where the transfer is made by deed or gift in contemplation of death.

Under subdivision 5 where any person or corporation becomes beneficially entitled in possession or expectancy to any property by any *such transfer* (referring to transfers by will, intestacy or deeds in contemplation of death) whether made before or after the passage of the act, and

Under subdivision 6 where any person or corporation *shall exercise a power of appointment* (meaning by will or deed), derived from any disposition of property made either before or after the passage of the act.

Summarizing the whole six subdivisions, it will be seen that subdivisions 1, 2 and 3 refer to transfers made by will; subdivision 4 to transfers by deed; and subdivisions 5 and 6 refer both to transfers by deed and will.

Manifestly, the legislature had in mind, when section 220 was enacted, the taxing of transfers made both by will and deed. Subdivision 6 refers, then, to *any* power of appointment, whether made by will or deed, " derived from any disposition of property made either before or after the passage of this act."

The legislature, having mentioned in this section transfers made both by will and deed, would have certainly added the word " will " to subdivision 6, if it had intended to limit that subdivision to a transfer under a power of appointment made by will only.

Not having added the word " will," the remaining portion of subdivision 6, then, would be in substance as follows: Any appointment *by will or deed* when

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exercised shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power *and* as though the property to which such appointment relates *had been bequeathed or devised by such donee by will.* In other words, where the power of appointment was exercised by deed, as in this case, " it shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which said appointment *relates had been bequeathed or devised* (by John G. Wendel, the donee) * * * by will."

The legislature under section 220 never intended to exempt from taxation property transferred under a power of appointment, where such power had been exercised by deed.

The exercise of a power of appointment derived *from a deed* made prior to the original Collateral Inheritance Tax Law of 1885 was *held* to be taxable where the donee exercised the power by will. *Matter of Delano, supra.*

It is the exercise of the power that gives the property to the appointee, and the tax is imposed *at the time the property is transferred by the exercise of the* power of appointment. *Matter of Vanderbilt, supra; Matter of Dows, supra; Matter of Delano, supra; Isham* v. *New York Asso. for the Poor,* 177 N. Y. 218–223; *Matter of Lowndes,* 60 Misc. Rep. 506.

The tax, then, in this case was imposed at the time the property was transferred by the exercise of the power of appointment, which was January 23, 1911, the date of the delivery of the deeds to the decedent's sisters.

The value of the real property transferred herein under the power of appointment was appraised at $1,525,000.

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The matter is remitted to the transfer tax appraiser for a reappraisal. The condition and *value* of the property at the time of the exercise of the power should determine its liability to the tax. *Matter of Dows, supra.*

The appraiser should fix the value of the transfer as of January 23, 1911, deducting, of course, the value of the life estate of John G. Wendel, which was derived from the will of his father before the passage of any collateral inheritance tax law.

Decreed accordingly.

Matter of the Application for Revocation of Letters Testamentary Issued Upon the Estate of HENRY REINHARDT, Deceased.

(Surrogate's Court, Bronx County, December, 1915.)*

Evidence — when declarations by decedent competent — common law marriages — husband and wife — attorneys — Code Civ. Pro. § 835.

The petitioner claimed that she was the wife of decedent by an agreement between them made on or about July 9, 1915, and that thereafter and until the decedent's death she remained his lawful wife. No evidence of a ceremonial marriage or of a compliance with chapter 339 of the Laws of 1901 was produced, and it was urged that since the passage of the act above referred to so-called common-law marriages no longer exist in this state and, second, that if they do exist the evidence fails to warrant a finding that the petitioner was the wife of the decedent. The evidence in the case examined and analyzed, and in denying the application,

Held, (1) that declarations by the decedent to the effect that he was not married, relating as they did to pedigree, were competent;

(2) That while the fact that petitioner was making arrangements to have a religious ceremony performed, and even her

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* Received too late for insertion in proper place.—[REPR.

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statements and those of the decedent to the effect that they were not married, might, if standing alone, be consistent with the existence of a marriage contract on the theory that the statements referred to a ceremonial marriage, they should not be so construed in the light of the claim for reimbursement for services rendered to the decedent made by the petitioner through her attorney after the death of the decedent as the latter claim is entirely antagonistic to and irreconcilable with the claim of the petitioner that she was the wife of decedent.

(3) That the introduction of the letters setting up said claim did not violate the prohibition contained in section 835 of the Code of Civil Procedure which does not prohibit an attorney at law from testifying as to the communications made by his client to him or his advice given thereon in the course of his professional employment, but provides only that he shall not be permitted to disclose such a communication and, when the same has already been disclosed with the acquiescence or consent of the client, the testimony is competent and is not prohibited by the section in question.

(4) That the petitioner's attorney was at least her agent and she is chargeable with admissions contained in his letters written in the course of his employment;

(5) That the presumption of marriage when it once arises is a strong one, but it is certainly rebuttable, and when the uncontradicted testimony of unimpeached witnesses and the subsequent acts of the alleged widow are such as to convince the court that no contract was made between the parties, the presumption is overcome;

(6) That the petitioner was required to establish her status in this court and a fair preponderance of the evidence on this issue is against her contention.

APPLICATION for revocation of letters testamentary

Bernard J. Tinney, for petitioner.

Edward J. Martin, for respondent.

SCHULZ, S. The nature of this proceeding is set forth in the opinion in *Matter of Reinhardt*, 92 Misc.

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Rep. 96, and a repetition thereof is therefore unnecessary. Since that decision, a hearing has been had by me, and upon the record and evidence produced it becomes necessary to determine whether the petitioner is entitled to the relief which she asks, and this involves the question whether she was the wife and is the widow of the decedent.

The petitioner claims that she became the wife of the decedent by an agreement between them made on or about the 9th day of July, 1914, and thereafter, and until the death of the decedent, remained his lawful wife. No evidence of a ceremonial marriage or a compliance with chapter 339 of the Laws of 1901 has been produced.

Two propositions are urged by the respondent, *first*, that since the passage of the act above referred to, so-called common-law marriages no longer exist in this state, and *second*, that if they do exist, the evidence fails to warrant a finding that the petitioner was the wife of the decedent.

That such a marriage was not recognized between January 1, 1902, when chapter 339 of the Laws of 1901 took effect, and the date when chapter 742 of the Laws of 1907 became effective, is not questioned, but by the passage of the latter act some doubt has arisen as to whether this is still the case.

In *Matter of Hinman*, 147 App. Div. 452, the court held that under the evidence produced it was satisfied that the relationship of marriage existed between the parties and had been consummated prior to the 1st of January, 1902, and then states that although it is not necessary to a decision of the case the court is of the opinion that the repeal of section 19 of the Domestic Relations Law by chapter 742 of the Laws of 1907 was intended to and did make common-law marriages valid in this state, citing *Meister* v. *Moore*, 96 U. S. 76.

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When the case came before the Court of Appeals (*Matter of Hinman,* 206 N. Y. 653), the latter, in affirming the order of the Appellate Division, said: "The conclusion of the Appellate Division, that chapter 742 of the Laws of 1907 has now made common-law marriages valid in this state, has not been considered or determined by us."

In *Matter of Smith,* 74 Misc. Rep. 11, the surrogate held that the passage of chapter 742 of the Laws of 1907 showed that the legislature intended to remove the absolute inhibition of such marriages. In that case, however, the facts themselves convinced the surrogate that no such marriage existed. See also *Kahn* v. *Kahn,* 60 Misc. Rep. 334.

So far, then, as we have any expression of an appellate or other court on the subject, the cases favor the contention of the petitioner, although the statement in *Matter of Hinman,* 147 App. Div. 452, appears to be *obiter dictum* only. In view of the conclusion which I reach upon the facts, however, it becomes unnecessary for me to determine this question in the matter before me; hence, I make no determination with regard to it. I assume, without deciding, that the petitioner may establish the relationship of marriage with the decedent at common-law, and proceed to a consideration of the facts.

The decedent was in the habit of spending his summers at a seaside resort near the city of New York. He had been there in the summer of 1913, and at that time the petitioner, under her former name, "Anna Klumpf," accompanied him in the capacity of an attendant or nurse. She occupied a room separate from that occupied by him and was known as "Mrs. Klumpf." The decedent was an aged man, in very poor health, suffering from cancer, and the petitioner was his housekeeper when he lived in the city of New

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York, and thus accompanied him as stated when he left for his sojourn at the seashore. In the summer of 1913 she became acquainted with a number of people who were also guests at the same hotel. The following year, the decedent and the petitioner again went there. His condition at that time was very much worse than it had been the year previous. The testimony of people who lived at the same hotel is that in the year 1914 he introduced the petitioner as his wife; that she then occupied the same room with him, in which there were two beds, and that he told some of the guests that he had married her since the year before, and others, that he had married her in February, 1914. I am satisfied that the witnesses who thus testified spoke the truth, and the facts thus narrated raise a presumption that the petitioner and the decedent had entered into a marriage contract, but fixed no definite date. *Clayton* v. *Wardell,* 4 N. Y. 230; *Gall* v. *Gall,* 114 id. 109; *Matter of Hamilton,* 76 Hun, 200.

A neighbor, however, testifies that she called at the apartment of the decedent, the day after the latter and the petitioner came back from the country, and that she then asked the petitioner if she was married to the decedent and the former said no, but that she had called herself Mrs. Reinhardt in the country to save her good name. The same witness says that the day before the death of the decedent the petitioner again told her that she was not married to the decedent and asked her to go to a clergyman and make arrangements so that she could get married to the decedent before he died. Witness states that she called upon the clergyman, but was told that the parties would have to procure a license. The wife of the clergyman in question testified that the petitioner called at the parsonage and said that the reason she had not come as per the arrangement made by the woman she had sent

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was that the man died the day after the woman called. The clergyman himself testified that the petitioner asked him if he remembered the lady who called to make arrangements for petitioner's marriage to Mr. Reinhardt. At attorney-at-law was called. There was no claim that he was not the attorney for the petitioner. The objection made to his testimony upon the ground that it was barred by section 835 of the Code of Civil Procedure, in effect conceded that the witness was the petitioner's attorney. He identified two letters he had written, one bearing date October 5, 1914, and addressed to a nephew of the decedent, who is named as executor in the instrument which has been propounded as the latter's last will and testament. In this letter, he calls the attention of the nephew to the fact that "Mrs. Anna Klump" has called upon him concerning her claim against the estate of his uncle and suggesting a conference to see if the claim cannot be mutually adjusted without the necessity of bringing an action against the estate to enforce it. The other letter, bearing date April 14, 1915, is directed to the attorney for the executor. In this letter the writer states: "The claim in behalf of Mrs. Anna Klump against the Estate consists of a verbal agreement made between the claimant and the decedent * * * wherein the decedent promised and agreed that if the claimant would take care of and attend to the decedent during his life, that he would provide for her financially so that she would have sufficient to live upon for the rest of her life," and further: "The decedent also promised that he would marry the claimant as soon as he would recover from his illness," and suggesting that the attorney take the matter up with the executor with a view to an amicable adjustment.

The petitioner was in court when the witnesses above

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referred to testified. She was called as a witness after their testimony had been given and the evidence and the letters introduced, but she neither contradicted nor explained the same in any way.

The physician who attended the decedent during his last illness testified that two days before the latter's death he told him that he was not married. Another witness says that she saw him in June, 1914, and he then said he would keep his word to his wife who had died and never would get married again. This testimony was admitted over objection and while I believe the other evidence submitted is sufficient to warrant the conclusion which I arrive at, I think this testimony relating as it did to pedigree was proper. *Washington* v. *Bank for Savings,* 171 N. Y. 166, 175. Another witness testified that after her return from the country petitioner said that the decedent wanted her to marry him and that it was a shame that she had been imported from Germany just to save money for the Reinhardt family. Testimony was also introduced to the effect that after the return of the decedent and the petitioner to the city in 1914, she was addressed by the name "Mrs. Klumpf," in the presence and hearing both of the petitioner and the decedent, without objection from either.

While the fact that the petitioner was making arrangements to have a religious marriage ceremony performed and even her statements and those of the decedent to the effect that they were not married might, if standing alone, be consistent with the existence of a marriage contract (*Renholm* v. *Public Adm.,* 2 Redf. 456), on the theory that the statements referred to a ceremonial marriage, I think they should not be so construed in the light of the claim made by the petitioner through her attorney after the death of the decedent. The latter is entirely antagonistic to and

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irreconcilable with the alleged relationship which she now claims existed between her and the decedent at that time.

The letters to which I have referred above were not objected to on any ground other than that under section 835 of the Code of Civil Procedure the witness was not permitted to disclose any communication made to him in his professional capacity. The introduction of the letters in question did not, in my opinion, violate the prohibition contained in section 835 of the Code. This section does not prohibit an attorney-at-law from testifying as to a communication made by his client to him or his advice given thereon in the course of his professional employment, but provides only that he shall not be permitted to *disclose* such a communication. When the same has already been disclosed with the acquiescence or consent of the client or at the latter's direction, the testimony is competent and is not prohibited by the section in question. *Baumann* v. *Steingester*, 213 N. Y. 328; *People* v. *Roach*, 215 id. 592.

It is undisputed that the writer of the letters was the attorney for the respondent. Hence, in my opinion, the attorney being at least her agent, she is chargeable with admissions contained in the letters. Wigm. Ev., § 1069; Mechem Agency, §§ 1782, 2179; 16 Cyc. 1003; *Anderson* v. *Rome, W. & O. R. R. Co.*, 54 N. Y. 334, 340

That the presumption of marriage when it once arises is a strong one, there can be no doubt, but it is certainly rebuttable (*Clayton* v. *Wardell, supra; Hynes* v. *McDermott*, 91 N. Y. 451), and when the uncontradicted testimony of unimpeached witnesses and the subsequent acts of the alleged widow are such as to convince the court that no contract of marriage

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was made between the parties, the presumption is overcome.

The petitioner was required to establish her status in this court. *Matter of Hamilton,* 76 Hun, 200.

Without further discussing the voluminous testimony that has been introduced, the petitioner in my opinion has failed to establish her status as the widow of decedent. On the contrary, I believe a fair preponderance of the evidence is against her contention. It follows that the application must be denied.

Application denied.

Matter of the Estate of CHARLES LOWEN, Deceased.

(Surrogate's Court, Bronx County, May, 1916.)

Accounting — in Surrogate's Court — executors and administrators — pleading — corporations.

A petition stated that the respondent was concealing bonds and certificates of shares of the capital stock of certain corporations belonging to the estate so that they could not be inventoried or appraised and the respondent interposed an answer in which the material allegations contained in the petition and supporting affidavits were denied. In the course of the examination inquiry was also made as to property not referred to in the petition. The answer did not allege title to or the right to possession of any property involved in the inquiry. In dismissing the proceeding as to all items except one,

Held, that the matter proceeded not as a trial but as an examination only; that the object of the statute is to provide a summary means of discovery and in case of a mere naked possession of decedent's property to compel delivery thereof to the legal representative; that the delivery of such property cannot be directed unless it conclusively appears as a matter of law that the claim of title by the respondent is not well founded; that the power of the surrogate to direct delivery

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of property where the proceeding is simply an examination and not a trial should be exercised with the greatest caution; and that a proceeding of this kind cannot be brought for the purpose of obtaining an accounting or of collecting a debt.

PROCEEDING by an executor under sections 2675 and 2676 of the Code of Civil Procedure for the discovery of property claimed to be withheld.

Norbert Blank, for petitioner.

Caldwell & Murphy, for respondent.

SCHULZ, S.—This proceeding was brought by one of the executors of the last will and testament of the deceased pursuant to the provisions of sections 2675 and 2676 of the Code of Civil Procedure.

The petitioner states in effect that he believes that the respondent is concealing bonds and certificates of shares of the capital stock of certain corporations, unknown to him, which belong to the estate, so that they cannot be inventoried or appraised. No other property of the estate is claimed, in the petition, to be withheld by the respondent. The respondent interposes an answer in which she denies the material allegations contained in the petition and the supporting affidavits.

The answer does not allege title to, or the right to possession of any property involved in the inquiry; hence the matter proceeded before me, not as a trial, but as an examination only. Code Civil Procedure, § 2676; note to this section in Report of Revision Commission transmitted to Legislature, February 9, 1914, p. 203.

The two sections under which proceedings of this character are now brought are a modification of sections 2707 to 2710 of the Code of Civil Procedure as it was prior to the revision (Laws of 1914, chap. 443).

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Under these sections, if the witness admitted having control of the property, but the facts as to the petitioner's right were in dispute, the proceeding came to an end, unless the parties consented to its determination by the surrogate in which event it was so determined. If in the course of the proceedings it became evident that a question of title was involved, the same could not be adjudicated without the consent of the parties. By the revision hereinbefore referred to, the power of the surrogate in these proceedings was enlarged so that if the answer alleged title to or the right to the possession of any property involved in the inquiry, the issue thus raised could be heard and determined by the surrogate and a decree made accordingly. Code Civ. Pro., § 2676. Where no such allegation was contained in the answer, however, the matter proceeded as an inquisition, practically as it would have under the old practice when no stipulation such as has been referred to was filed; hence the decisions rendered while the former sections of the Code were in force are still precedents to be considered on this application.

It has been repeatedly held that the object of the statute was to provide a summary means of discovery, and in case of a mere naked possession of decedent's property to compel delivery to the legal representative. *Matter of Knittel,* 5 Dem. 371; *Matter of Stewart,* 77 Hun, 564, citing *Matter of Cunard,* 27 N. Y. St. Rep. 128; *Matter of White,* 119 App. Div. 140.

The delivery of the property concerning which inquiry is had cannot be directed unless it conclusively appears as a matter of law that the claim of title by the respondent is not well founded. *Matter of Gick,* 113 App. Div. 16.

It seems to me to be obvious that the power of the surrogate to direct delivery of property where the pro-

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ceeding is simply an inquiry and not a trial should be exercised with the greatest caution.

In this matter the petitioner urges that fifty shares of the common stock of the Laclede Gas Company are one of the items of property which the court should direct the respondent to deliver to the representatives of the estate. It appears from the evidence that the decedent during his lifetime owned fifty shares of the common stock of this corporation. His ownership was evidenced by a certificate of stock which is in evidence and upon which is indorsed an assignment apparently made by the decedent to his wife, the respondent, dated June 19, 1912, and upon that date acknowledged before a notary public. A clerk of the transfer agent of the corporation testified that this certificate was cancelled on December 30, 1913, and upon the same day the stock in question was transferred upon the books of the corporation and a new certificate was issued in the name of the respondent in this proceeding. It will be noted that the date of the transfer and the date of the issuance of the new certificate in the name of the respondent are over one year before the death of the decedent. The respondent admits that she has in her possession the certificate which is in her name, and states that the shares in question were presented to her by her husband in December, 1913.

On such evidence, I cannot as a matter of law conclude that the stock in question belongs to the decedent's estate.

In the course of the examination of the witnesses, inquiry was also made with reference to assets and property of the estate which had not been referred to in the petition. It appears that prior to the death of the decedent a check in the sum of $500, which had been signed by decedent and filled in by his wife, was

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cashed by her, and she testifies that two days before his death, on a Saturday, another check was filled out which was dated as of the following Monday on which day the decedent died, but for which she claims to have received cash from an acquaintance on the Sunday before the decedent's death. The petitioner urges that the respondent should be ordered to pay to the executors of the decedent a small balance of the $500 check which he claims remained after the payment of doctor's bills and other expenses, and also that she should pay the amount of cash received by her upon the other check, to wit, the sum of $250. The respondent testifies, however, that all of this money was used up in the payment of bills and expenses of the decedent and his household, and that there is no part of this money still in her possession.

The moneys received on these checks appear to me to be rather the subject of an accounting and a proceeding of this kind cannot be brought for the purpose of obtaining an accounting or of collecting a debt. If there is money due from the respondent to the decedent by reason of a failure to properly apply the funds which she obtained upon the checks in question, resort should be had to a forum where the matter may be properly tried and where such counterclaims, as the respondent intimates she has, could be heard. The rights of the parties with reference to the moneys realized on the checks in question, and to which there was no reference in the petition, should not be determined summarily, and may not legally be so determined. *Matter of Stewart, supra; Matter of Carey,* 11 App. Div. 289; *Matter of White, supra; Matter of Cunard's Estate, supra.*

The petitioner also contends that the respondent should be ordered to pay to the executors the amount which she received upon the sale of the piano which

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was in the apartment occupied by the decedent and respondent, his wife. There is no dispute that the piano was sold by the respondent, but there is not sufficient evidence to warrant the conclusion as a matter of law that the piano was the property of the decedent, and that the respondent has the moneys which she obtained therefor, and under these circumstances I do not feel that I would be justified in making the order desired.

The final item of personal property which the examination disclosed was in the possession of the respondent is a check-book of the decedent showing withdrawals by the decedent from his account in the Colonial Bank. This book is in evidence, and is undoubtedly the property of the estate and should be turned over to the representatives of the decedent unless there is some good reason why this should not be done. The respondent, through her counsel, has furnished the attorney for the executors with a copy of the book in question. She states that she is willing to deposit the book in the office of the clerk of this court with the privilege to the attorney for the executors to fully examine the same, but she asks that she be not directed to deliver the check-book to the executors contending that the same contains entries showing that the decedent was indebted to her in certain amounts. Counsel for the executors, however, states that he desires possession of the book in question so that he may have the handwriting examined. I think that the interests of all the parties will be best conserved if the book is deposited in the office of the clerk of this court and impounded until the further order of the court, subject to the examination of any of the parties.

An order will be made impounding the check-book in question as indicated and dismissing the proceeding

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as to the other items of property referred to without prejudice, however, to any action or proceeding in the proper forum. Under all the circumstances I do not believe that costs should be imposed in this matter.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of BERTHA SHANLEY, as Administratrix, etc., of JOHN SHANLEY, Deceased.

(Surrogate's Court, Bronx County, May, 1916.)

Executors and administrators — accounting — proceeds of policy of life insurance — charge for funeral expenses not justified.

An industrial life insurance policy taken out by the decedent was under the application accompanying and made a part of it payable to his first wife, who predeceased him. The accountant, decedent's second wife, received from the insurance company the proceeds of this policy as administratrix, but did not charge herself therewith in her account as filed, and claimed that she was entitled to the same as the wife of the insured. There was no new designation of the beneficiary after the issuance of the policy and the death of the decedent's first wife. The accountant also received a death benefit applicable to the payment of funeral expenses, credited herself with the payment of such expenses, but did not charge herself with the amount of the same. On objections filed,

Held, that while the deceased used the term "wife" in the application, the fact that he inserted the name of the person who was his wife when the application was made showed that he intended the beneficiary to be the latter and not the accountant; that the payment by the insurance company under the terms of the policy did not make the moneys paid the property of the person to whom the company elected to pay the same; that the provision for such payment is only for the protection of the insurance company but does not grant or take away a cause of action from any person; that upon the death of the first wife her rights under the policy ceased and passed to her

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husband and upon the latter's death it became a part of his estate; and that as the accountant came into possession thereof and is his administratrix she should account for it as such. Also,

Held, that the charge against the estate for funeral expenses was not justified.

PROCEEDINGS and judicial settlement of an administratrix's account.

James A. Sullivan, for petitioner.

Felix A. Muldoon, for respondent.

John A. McEveety, special guardian.

SCHULZ, S. The widow of the decedent, being also the administratrix of his goods, chattels and credits, filed her account and prayed for its judicial settlement.

The decedent left him surviving two children of full age, the issue of a former marriage, and one child, an infant, the son of the decedent and the accounting administratrix. The accountant charges herself with having received no property of the decedent of any kind.

One of the adult children of the decedent filed objections in which he claims that the administratrix has failed to charge herself with the sum of $600, forming a part of decedent's estate which she received, and he also objects to an item in schedule C of said account in the sum of $191.60 paid for funeral expenses and to two expenditures, one for medical treatment in the sum of $42 and one for nursing in the sum of $40, which, it is alleged, appear in schedule G of the account and for which no vouchers were filed. No item of $42 appears in schedule G of the account,

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and upon the hearing the objections to this alleged item and to the item of $40 were withdrawn.

It appears that the administratrix has received the sum of $600, which was the amount due upon an industrial life insurance policy originally in the sum of $500. The policy is in the usual form and provides for payment "to one of the persons described in Condition First." Condition "First" provides that the company may pay "to either the executor or administrator, husband or wife, or any relative by blood, or lawful beneficiary, of the insured * * *." The decedent procured this policy at the time that his first wife was still living and in the application for the same, which he signed, the name of the beneficiary "subject to provisions of policy applied for" was given as "Kate Shanley"—"Wife." The accounting administratrix urges that by virtue of the application in question, the policy was payable to the wife of the decedent, and as she was the wife of the decedent at the time of the latter's death she became the beneficiary under the policy.

In this she is in error. There was no new designation of the beneficiary, after the issuance of the policy and the death of the decedent's first wife, Kate Shanley. At the time the application was made and the policy issued, the accountant was not the wife of the deceased, and while he used the term wife in the application and the application formed a part of the contract of insurance (*Wachtel* v. *Harrison*, 84 Misc. Rep. 76), it clearly appears from the fact that he inserted the name of the person who was his wife when the application was made, that he intended the beneficiary to be the latter and not the accountant who occupied that relationship at the time of his death. *Day* v. *Case*, 43 Hun, 179.

The insurance company did in fact pay the death

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benefit to the accountant. The accountant sets forth that the check was delivered to her as administratrix. The fact that the company may pay the death benefit to one of several persons does not make the moneys paid under the policy the property of the person to whom the company may elect to pay the same. The provision for such payment is only for the protection of the insurance company, but does not "grant or take away a cause of action from any person." *Wachtel* v. *Harrison, supra; Ruoff* v. *John Hancock Mutual Life Ins. Co.,* 86 App. Div. 447. It cannot by electing to pay any one of the persons mentioned in condition "First," in my opinion, invest that person with the absolute ownership of the moneys paid. If the contrary were the fact, then it would have the power to make any person the beneficiary who would come under the designation quoted above, to the exclusion of the others, and thus a surviving husband or wife would be entirely deprived of any part thereof if payment were made to a relative by blood. *Wokal* v. *Belsky,* 53 App. Div. 167.

Upon the death of Kate Shanley, her right to the death benefit ceased and passed to her husband. *Bradshaw* v. *Mutual Life Ins. Co.,* 187 N. Y. 347. Upon the latter's death it became a part of his estate (*Olmsted* v. *Keyes,* 85 N. Y. 593; *Walsh* v. *Mutual Life Ins. Co.,* 133 id. 408; *Waldheim* v. *John Hancock Mutual Life Ins. Co.,* 8 Misc. Rep. 506), and as the accountant came into possession thereof and is his administratrix she should account for it as such. *Ruoff* v. *John Hancock Mutual Life Ins. Co., supra.*

The objection to her failure to include this item in her account must, therefore, be sustained.

As to the second objection, it appears that the decedent was a member of an association of pipe fitters. As such, a death benefit accrued upon his

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death. The constitution of the association in question provides that upon the death of a member in good standing, the sum of $200 is to be paid to those defraying the expenses of the funeral; it further provides that the overplus, if any, shall be paid to either the widow, eldest child, mother or father of the deceased. The accountant received this death benefit of $200 and paid the funeral expenses. She now claims that she is entitled to keep the death benefit thus paid to her and to charge the estate with the amount of the funeral expenses. In this she is also in error. The section is very clear and explicit, and the charge against the estate for the funeral expenses was not justified unless the estate was also credited with the amount of the death benefit. Under these circumstances, the objection to the item in schedule C must be sustained.

Unfortunately, the estate in question is at best very small indeed and the condition of the accountant who is left with an infant child dependent upon her is one which strongly appeals to the equitable consideration of this court.

It appears that she did not set aside the exemption to which she was entitled under section 2670, subdivision 4 of the Code of Civil Procedure, and no credit is claimed therefor in her account. In his memorandum submitted on this application, counsel now asks that such allowance be made. She was clearly entitled to such an exemption, the court has the power to award it to her (Code of Civ. Pro., § 2735), and in view of the hardship under which she is laboring, in my opinion, should do so.

I am satisfied that the failure of the widow to account for the proceeds of the policy of life insurance was due to an honest and very natural mistake. On the accounting a deficit was shown and no claim for commissions and expenses of administration was

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made. As the account will now show a balance by reason of the surcharge, commissions and the expenses of the accounting will be allowed unless waived.

The following disposition will therefore be made of the matter: The widow will be allowed an exemption of $150. The accounting administratrix will be credited with the item of $40, as to which the objection was withdrawn and she will be surcharged with the sum of $600, the amount received by her from the insurance company. The item of expenses for the funeral bill amounting to $191.60 in schedule C will be disallowed. The balance remaining after the deduction of commissions and the expenses of the accounting will be distributed to those entitled thereto by law.

Decreed accordingly.

Matter of the Probate of the Last Will and Testament of JOSEPH CHRISTOFFEL.

(Surrogate's Court, Bronx County, May, 1916.)

Wills — attesting witnesses — evidence — when probate denied.

The attesting witnesses of a will in direct contradiction to the statements contained in the attestation clause testified that the decedent was unconscious when the alleged will was executed, that he did not declare it to be his will nor ask them to act as witnesses and that the cross mark which appeared in lieu of his signature was made with the assistance of another who was present at the time and guided the decedent's hand. The testimony of another witness who was present at the time the alleged will was executed was to the effect that it was duly executed.

Held, in denying probate, that the due execution of a propounded document may be shown by witnesses other than the attesting witnesses; that as a rule the testimony of such witnesses is not entitled to the same weight as is given to that

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of attesting witnesses; that a will may be admitted to probate even against the testimony of the attesting witnesses; that the burden of proving the execution of the propounded instrument with the formalities as required by law and by a competent testator still remains upon the proponent, and that the proponent in this matter had failed to sustain the burden placed upon him.

PROCEEDINGS on the probate of a last will and testament.

Thomas N. Cuthbert, for proponent.

Warren McConihe, for respondents.

E. E. Woodbury, Attorney-General of the State of New York.

Ernest E. L. Hammer, public administrator of Bronx county.

Arthur A. Henning, special guardian for unknown heirs.

Deiches & Goldwater, for creditor.

SCHULZ, S. The attesting witnesses in this matter swear positively that the decedent at the time when the alleged will is said to have been executed was unconscious, that he did not declare the instrument to be his will, that he did not ask them to act as witnesses, that the cross mark which appears in lieu of his signature was made after a pen had been placed in his hands by another who was present at the time and that the latter took the hand of the decedent in his and guided it in making such mark.

Their testimony is in direct contradiction with the

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statements contained in the attestation clause which they subscribed. Their explanation of this fact is that they did not know what was in the attestation clause when they signed it and that they signed the document because they thought that all of the property of the decedent was, under its terms, to go to two girls who had lived with the decedent and his wife practically in the relation of parent and child; this being the disposition which the decedent on some prior occasion had told them he wished to make of his property.

The attesting witnesses are foreigners, unfamiliar with the requirements of the execution of a valid last will and testament, and up to this time perhaps were not impressed with the importance and solemnity of the act of testation. These facts might readily account for the signing of the attestation clause in question without a knowledge of its contents. Counsel also called as witnesses three persons, only one of whom, however, was present at the time of the alleged execution of the instrument. The testimony of this witness contradicts that of the attesting witnesses and is to the effect that all of the statutory formalities were observed and that the alleged testator was competent, of full age and free from undue influence, restraint or duress. While not a beneficiary under the will itself, this witness is the grantee named in a deed made by the decedent a few days prior to the execution of the document in question conveying certain real estate which is referred to in the alleged will and which constitutes the bulk of the decedent's property; and he is the person who produced the will at the bedside of the decedent and guided his hand.

While it is undoubtedly true, as contended by counsel for proponent, that the due execution of the propounded document may be shown by witnesses other than the attesting witnesses and that such an instru-

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ment may be admitted to probate even against the testimony of all the attesting witnesses (Code Civ. Pro., § 2612; *Trustees of Auburn Theological Seminary* v. *Calhoun,* 25 N. Y. 422; *Tarrant* v. *Ware,* in note to above case, 25 id. 425; *Matter of Cottrell,* 95 id. 329), the burden of establishing its execution with the formalities required by law and by a competent testator remains upon the proponent. See *Matter of King,* 89 Misc. Rep. 638 and cases cited.

The special guardian appointed for unknown persons has, since the close of the examination of the witnesses, filed his report in which he urges that the instrument be not admitted to probate. As a rule the testimony of witnesses other than attesting witnesses is not entitled to the same weight as that given to the latter. *Matter of Higgins,* 94 N. Y. 554. I see no special reason which in the light of all the circumstances surrounding the alleged execution of this instrument should impel me to give more weight to the one witness who testifies to its proper execution, than to the two attesting witnesses who testified to the contrary.

The objections which had been filed prior to the taking of proofs were all withdrawn so that the matter proceeded before me as an uncontested probate and considerable latitude was allowed to the proponent. Notwithstanding that fact, however, he has in my opinion failed to sustain the burden that is upon him.

It follows that probate must be refused and it will be so decreed.

Probate denied.

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Matter of the Estate of KLUMPF, Deceased.

(Surrogate's Court, New York County, May, 1916.)

Wills — construction of — devise of real estate in trust — provisions for disposition of income as well as corpus of estate after death of life tenant deferred — Code Civ. Pro. § 2615.

Testator devised all his real estate in trust to pay over and apply one-third of the income to the use of his wife for her life with direction to divide the remaining two-thirds equally among his three children during the life of their mother. Testator's wife and all his children survived him, then one of his daughters died intestate leaving her surviving three children who subsequently died intestate without issue them surviving and leaving her husband as their sole next of kin. On petition of the trustee for a construction of the will as to the disposition of the income bequeathed to testator's children during the life of their mother, held, that the daughter of testator who died took a vested interest in one-third of two-thirds of the income during the life of her mother, and upon her death her interest in the income passed to her husband and children and upon the death of all the children their father succeeded to their interest and was entitled to two-ninths of the income during the life of testator's widow.

A construction of that part of the will providing for the disposition of the income as well as the corpus of the estate, after the death of the life tenant, deferred until such happening under section 2615 of the Code of Civil Procedure.

APPLICATION by a trustee for the construction of a will.

Lewis S. Goebel (George V. Grainger, of counsel), for petitioner.

William Brunner (Patrick L. Ryan, of counsel), for Susan Von Roemer et al.

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Adolph E. Gutgsell, special guardian of infant William Klumpf.

FOWLER, S. The trustee under the will of the testator has filed a petition asking for a construction of that part of the will which provides for the disposition of the income given to testator's children during the life of his wife. That part of the will which is relevant to the question presented for consideration reads as follows: "*Third.* I hereby give, devise and bequeath all my real estate * * * in trust to pay over and apply to the use of my wife Anna Maria Klumpf for and during the residue of her natural life one-third part thereof, and to divide the remaining two-thirds parts equally among my three children, Susanna Weber, Adam Klumpf and William Klumpf, for and during the term of the natural life of my said wife."

The testator died in 1883 and was survived by his wife and the three children above named. On March 14, 1893, the testator's daughter Susanna Weber died, leaving three children her surviving. Subsequently and at various times prior to the filing of the petition herein the three children of Susanna Weber died intestate, leaving no issue them surviving, and leaving their father as their sole next of kin. He is still living. The trustee therefore is presently interested in ascertaining to whom he should pay the income which the decedent directed his trustee to pay to his daughter Susanna Weber.

The language of paragraph 3 of the will is free from ambiguity or indefiniteness. It expressly provides that two-thirds of the income shall be paid to the testator's three children during the life of Anna Maria Klumpf, the testator's widow. As Susanna Weber survived the testator, she took a vested interest in one-third of two-

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thirds of the income from testator's real estate during the life of the widow, and as she died intestate during the life of the widow her interest in the income passed to her husband and children, and upon the death of all the children intestate, leaving no issue and no husband or wife, their father, Conrad Weber, succeeded to their interest, and is entitled to two-ninths of the income from decedent's real estate during the life of testator's widow.

The trustee also asks for a construction of that part of the will which provides for the disposition of the income as well as the corpus of the estate after the death of the life tenant. As the life tenant is still living, and this court will not, under section 2615 of the Code of Civil Procedure, construe provisions of a will where there are no present payments of income to be made, or where the time has not arrived for the distribution of the principal, the question of construction of the other paragraphs of the will will be deferred until the death of the life tenant.

Decreed accordingly.

Matter of the Estate of MARY C. CALLAHAN, Deceased.

(Surrogate's Court, New York County, May, 1916.)

Discovery — in Surrogate's Court — when not entitled to jury trial.

The petitioner in a discovery proceeding in the Surrogate's Court is not entitled to a jury trial as matter of right.

MOTION for a jury trial in a discovery proceeding

Siegel, Corn & Siegel (Jacob H. Corn, of counsel), for petitioner.

Ellwood M. Rabenold (T. A. S. Beattie, of counsel), for respondent.

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Misc.] Surrogate's Court, New York County, May, 1916.

FOWLER, S. This is a discovery proceeding in which a jury trial is demanded as of right. A right to a trial by jury at common law involved a legal title to property in dispute and a verdict for damages. *Matter of Silverman,* 87 Misc. Rep. 571. Here the petitioner seeks to discover property and not to recover damages. If he discovers the property, then in such discovery proceeding against the person in alleged possession he claims the property *in specie.* I doubt the right to a trial by jury in such a proceeding as this. At common law there was but one form of action for the recovery of specific chattels which, like the *actio depositi* of the Roman law, was founded on a bailment. At a later day the action of replevin, founded on wrongful distress, was extended to any wrongful taking. The present proceeding is for a discovery with a subsequent equitable direction *in personam* to deliver up the property discovered. Equitable relief is always *in personam.* Assuming that this respondent should give away the property the moment before trial, this court could give no relief nor could it convert this proceeding into an action for trover and conversion. The proceeding, in other words, would be defeated by a mere transfer. It is absurd to say that the discovery sections under the reformed Surrogates' Code of 1914 raise up a new form of action at common law. New forms of action are not developed so easily. Derivatively this proceeding resembles an equity proceeding, and not one formerly recognized at common law. Only those issues formerly triable by jury by constitutional provision can be submitted to juries in this court under the new law. This is not such an one. Motion for jury trial denied.

Motion denied.

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Matter of the Estate of FRANCIS L. LELAND, Deceased.

(Surrogate's Court, New York County, May, 1916.)

Executors and administrators — application for order directing physical examination of executor denied — Code Civ. Pro. § 2564.

Depositions — examination before trial — evidence — Code Civ. Pro. § 873.

As physical infirmity is not one of the disqualifications mentioned in section 2564 of the Code of Civil Procedure which specifies the various causes which render a person incompetent to receive letters testamentary, an application for an order directing a physical examination of one named as executor in a will must be denied.

Where on allegations that one named as executor in a will was physically and mentally incapable of performing the duties of executor objections were filed to the issuance of letters testamentary to him, and it does not appear from the moving papers that his testimony if taken before the trial would be used upon the trial of the issue raised by the objection, and that an examination as to his mental capacity can be conducted as effectively on said trial as on an examination before trial under section 873 of the Code of Civil Procedure, the application for an examination into the matter before trial will be denied.

OBJECTIONS filed to issuance of letters testamentary to the executor named in the will.

Olney & Comstock (Robert C. Beatty, of counsel), for motion.

Kellogg & Rose (L. Laflin Kellogg, of counsel), opposed.

FOWLER, S. Some of the legatees under the will of the testator have filed objections to the issuance of letters testamentary to Timothy M. Cheesman, who is

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named as executor in the will. The objecting legatees allege that Mr. Cheesman is physically and mentally incapable of performing the duties of executor. Issue having been joined on this point, the objectants make this application for an order in accordance with the provisions of section 873 of the Code directing Mr. Cheesman to submit to a physical and mental examination and designating certain physicians to make such examination.

Assuming that section 873 of the Code is made applicable to the Surrogate's Court by section 2770 (which I do not decide), the right to a physical examination of a party before trial is limited by that section to an action brought to recover damages for personal injuries. Therefore, that part of the application which asks for an order directing the physical examination of Mr. Cheesman must be denied. Section 2564 of the Code specifies the various causes which render a person incompetent to receive letters testamentary, but physical infirmity is not one of the disqualifications mentioned in that section. The only objection, therefore, that remains to be tried is the one alleging "want of understanding."

To sustain this objection it will be necessary for the objectants to prove upon the trial of that issue that Mr. Cheesman lacks the understanding necessary to a proper performance of the duties of executor. His examination before trial upon the issue of his lack of understanding would necessarily be limited to his own testimony as to his mental capacity. But if the objectants wish to prove by Mr. Cheesman himself that he lacks mental capacity, this may be done upon the trial of the issue before me just as effectively and as expeditiously as upon a separate examination before the trial. The cases hold that an examination before trial will only be allowed when it is alleged that the testi-

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mony is necessary to the moving party's case or defense and that he intends to offer it on the trial. *Dudley* v. *New York Filter Mfg. Co.*, 80 App. Div. 164; *Rogers* v. *Adler*, 137 id. 197. Unless Mr. Cheesman testified in the examination before trial that he lacked the mental capacity necessary for the proper performance of the duties of an executor, the moving parties could not be expected to use his testimony on the trial, and as Mr. Cheesman has denied the allegations contained in the objections, and is desirous of qualifying as an executor, it is extremely improbable that he would testify to his own "want of understanding." It is therefore manifest that if the objectants expect to succeed on the trial of the issue as to Mr. Cheesman's mental capacity, they would not use on such trial the testimony given by him in his examination before trial.

I think, therefore, that as it does not appear from the moving papers that the testimony of Mr. Cheesman, if taken before the trial, would be used upon the trial of the issue raised by the objections, and that as an examination of Mr. Cheesman as to his mental capacity can be conducted as effectively before me on the trial of the issues raised by the objections as on an examination before trial under section 873 of the Code, the application should be and it is denied. I will try the issue raised by the objections and answer on June 12, 1916.

Application denied.

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Misc.] Surrogate's Court, New York County, May, 1916.

Matter of the Transfer Tax upon the Estate of MATTHEW C. D. BORDEN, Deceased.

(Surrogate's Court, New York County, May, 1916.)

Partnership — definition of "good-will" — contracts — when firm name exclusive property of surviving partners — transfer of decedent's interest in good-will of business not subject to transfer tax.

The "good-will" of a partnership business is an economic value recognized in law and denoting the chance of future profit while carrying on an established business of repute in public consideration.

While "good-will" as so defined belongs primarily to the partnership as a whole, it may be the subject of disposition or contract *inter vivos*.

Where by the express terms of a partnership agreement the firm name upon the death of a member thereof becomes the exclusive property of the surviving partners, and it is obvious from the provisions of the partnership agreement that the parties thereto did not intend that the representatives of a deceased partner should receive from the surviving partners any financial consideration on account of the deceased partner's interest in the firm name, the transfer of decedent's interest in the good-will to the surviving partners by virtue of the partnership agreement does not constitute a taxable transfer under the provisions of the Tax Law.

APPEAL from an order assessing the transfer tax.

Lafayette B. Gleason (William W. Wingate, of counsel), for state comptroller.

Shearman & Sterling (John A. Garver, of counsel), for respondents.

FOWLER, S. The state comptroller has appealed from the order assessing a tax in this estate, and contends that the appraiser erred in reporting that the dece-

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dent's interest in the good-will of the firm of M. C. D. Borden & Sons did not constitute an asset of the estate subject to taxation under the provisions of the Transfer Tax Law. This is the only question raised by the appeal.

This matter concerns only that subtle entity which is known to our modern jurisprudence as "good-will." In various common law countries the emergence of the legal conception of good-will has pursued different courses. In all systems 'good-will" is a modern conception of an intangible *res,* recognized as property. In the country of the original common law of English-speaking peoples, the particulars of good-will are inseparably associated with the Chancellorship of Lord Eldon. As Lord Eldon came too late in the history of equity jurisprudence to belong to our political hierarchy, the doctrines of that distinguished judge do not form part of our jurisprudence. Good-will is one of the matters which our post-revolutionary courts are free to develop for themselves without reference to the authority of the older common law courts. In this department of our law, the late English adjudications have no force.

The definitions of "good-will" are many and irregular, and I prefer to define it, for myself, as that economic value recognized in law and denoting the chance of future profit while carrying on an established business of repute in public consideration. This chance of future profit has been rightly, I think, determined to be well measured in terms of value by past profits, but always with due allowance for the loss of personal service of the deceased partner, where that service was of special and inseparable advantage to the business undertaking. Good-will, as so defined, belongs primarily to the partnership as a whole. Like any existing thing of recognized value it may be the

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subject of disposition or contract *inter vivos*, or it may be dealt with in the ordinary channels of posthumous succession. In the instance of posthumous succession it may be subject to the tax called generically "death duties." But that point is not now here.

When good-will is dealt with in the realm of contracts *inter vivos* it is governed by the rules regulating other contractual dispositions of property. A contract relating to good-will, in other words, affords no exception to the rules governing contracts generally. A partnership contract may expressly provide that *inter se* on the death of one partner the "good-will" shall belong to the survivors. This was recognized in the famous case of *Wederburn* v. *Wederburn, No. 4,* 22 Beav. 84. Here the contract operates as a present assignment for value and is not a voluntary conveyance. If a contract so provide there is then nothing left to pass to the successors of the deceased partner by any mode of posthumous succession. The contract is *inter vivos* and made for a valuable consideration. The entity vests in the surviving partners by force of the terms of the express contract of partnership; it is based on a sufficient and valuable consideration to be enforced in a court of equity. At this place it should be noticed that Lord Eldon thought good-will always went to the surviving partner, without any contractual assignment; but this is not in accord with modern authorities. That good-will may now pass by express contract to surviving partners I have never seen doubted. *Churton* v. *Douglas,* Johns. Eng. Ch. 174; *Menendez* v. *Holt,* 128 U. S. 514.

With this general reference to the fundamental principles, which, I assume, under our law, now govern the devolution of good-will, let me point out, before proceeding to the particular features of this issue now before me for solution, that the "firm name" always

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constitutes a part of good will in any aspect, and under certain circumstances it may be the most valuable part. *Churton* v. *Douglas,* Johns. Eng. Ch. 174; *Rodgers* v. *Nowill,* 6 Hare, 325. After this somewhat technical but condensed review of general principles, I can now proceed less abstractly and more safely to the consideration of the *res sub judice.*

The decedent was a member of the firm of M. C. D. Borden & Sons. The firm was organized for the purpose of carrying on a general dry goods commission business. The partnership agreement provided that the partnership should commence on the 1st day of July, 1910, and terminate on the 1st day of July, 1913. The members of the partnership were Matthew C. D. Borden, the decedent, and his two sons, Bertram H. Borden and Howard S. Borden. The decedent contributed $1,000,000 to the partnership, and his sons contributed $75,000 and $25,000 respectively. The sixth paragraph of the partnership agreement provides that the partnership shall not be dissolved by the death of any of the partners; that the capital of a partner dying during the continuance of the partnership shall remain with the firm until the termination of the partnership by time limitation; that the surviving partner or partners shall have the right at their option to continue the business for the remainder of the partnership term under the firm name of M. C. D. Borden & Sons, and that the estate of the partner so dying shall be entitled to the same profits in the business as the deceased partner would be entitled to if he were living. Under this paragraph of the partnership agreement the decedent could not transfer by will any interest in the partnership name, as that became by virtue of the partnership agreement the property of the surviving partners. Apart from his investment in the partnership the decedent could only transfer by will his right

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to continue his investment in the business until the termination of the partnership by time limitation. Whether this was an asset or a liability was purely speculative, being dependent upon whether the business was profitable or otherwise. He died on the 27th day of May, 1912, and the partnership would expire by time limitation on the 1st day of July, 1913. The surviving partners could terminate the partnership at any time after the death of the decedent, as there was nothing in the partnership agreement which compelled them to continue the partnership after his death. Therefore the value of the right given by the partnership agreement to continue the decedent's investment in the partnership until its termination by time limitation is so speculative, so incapable of ascertainment with reasonable certainty, that it may be disregarded in estimating the value of the decedent's interest in the partnership.

Paragraph "seven" of the partnership agreement provides: "Upon the death of any of the partners the surviving partners or partner shall have the exclusive right to the use of the said firm name of M. C. D. Borden & Sons." Under this paragraph the legal representatives of the decedent had no right to or interest in the firm name, the use of the name being given exclusively to the surviving partners.

Paragraph "twelve" provides that upon the dissolution of the partnership the partner, who for the time being shall be the senior member of the firm, shall have the exclusive right to use the firm name. This paragraph deprives not only the legal representatives of a deceased partner of any interest in the firm name, but also the junior surviving member. If the decedent's sons continued the partnership until July 1, 1913, when it expired by limitation, the senior member of the firm at that time became entitled to the use of

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the firm name as his individual property, so that even if the partnership was continued until July 1, 1913, and the testator's investments in the partnership remained intact until that time, his legal representatives would have no right to or interest in the firm name, that having been given by the partnership agreement to the person who was then the senior member of the firm.

The state comptroller also contends that while paragraph "seven" of the partnership agreement gives the surviving partners an absolute right to use the firm name, it does not necessarily follow that the surviving partners could not be compelled to pay the representatives of a deceased partner the value of his interest in that part of the good will represented by the firm name. Assuming that the language of paragraph "seven" would bear such a construction, the state comptroller fails to indicate how the value of such an interest may be ascertained. Under the partnership agreement the firm name became, upon the death of the decedent, the exclusive property of the surviving partners. If it is exclusively the property of the surviving partners it cannot become, during the continuance of the original partnership, the property of any other person. The interest of the deceased partner in the firm name could not be sold, because no one would purchase an interest which could not be reduced to possession, since the entire firm name was, by the partnership agreement, the exclusive property of the surviving partners. This contention of the state comptroller is therefore untenable. But I am inclined to think that the language of the partnership agreement will not bear the strained construction placed upon it by the state comptroller, and that it is obvious from the provisions of the entire agreement that the parties thereto did not intend that the representatives

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of a deceased partner should receive from the surviving partners any financial consideration on account of the deceased partner's interest in the firm name.

There remains the contention of the state comptroller that the transfer of decedent's interest in the good-will to the surviving partners by virtue of the partnership agreement constituted a taxable transfer under the provisions of the Transfer Tax Law. The state comptroller predicates his contention upon the use of the words "when the transfer is * * * by deed, grant, bargain, sale or gift * * * intended to take effect in possession or enjoyment at or after such death" in subdivision 4 of section 220 of the Tax Law. This would necessitate a construction of the Transfer Tax Statute which would make it applicable to transfers effected under a contract or agreement made for a valuable consideration. The first statute which was passed in this state for the purpose of imposing a tax upon the estates of deceased persons was entitled "An act to tax gifts, legacies and collateral inheritances in certain cases." This was passed in 1885 and was amended in 1887 and 1889, the title remaining the same. Under this act it was provided that any property "transferred by deed, grant, sale or gift intended to take effect in possession or enjoyment after the death of the grantor or bargainor" was, with certain exceptions, subject to tax. In 1892 the legislature materially amended the statute and entitled it "An act in relation to taxable transfers of property." Section 1 specified the particular transfers which would, under the act, be taxable transfers. These were a transfer by will or by the intestate laws of this state, and also a transfer of property "by deed, grant, bargain, sale or gift made in contemplation of death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death."

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It is therefore manifest that the legislature in changing the title from "An act to tax gifts, legacies and collateral inheritances" to "An act in relation to taxable transfers" did not change the character of the transfers that were taxable under the act of 1885, and which were concededly limited to gifts, legacies and collateral inheritances. The statute in force at the present time is entitled "An act in relation to taxation," and begins by enumerating the transfers that are taxable. It incorporates the language above quoted from the acts of 1885 and 1892 as to transfers by bargain or sale. I think that the legislature did not intend, in the various enactments in relation to taxable transfers, that a tax should be imposed upon the transfer of property effected by a deed or contract which was made for a valuable consideration. The United States Supreme Court in *Magowan* v. *Illinois Trust Co.*, 170 U. S. 283, held that a similar statute by the state of Illinois imposed a tax on succession and not on the property. In *Matter of Miller*, 77 App. Div. 473, the judge who wrote the opinion said: "I do not consider that the statute has reference to transfers made upon a valuable consideration, but that it relates merely to voluntary transfers without consideration." *Matter of Spaulding*, 49 App. Div. 541; affd., 163 N. Y. 607; *Matter of Baker*, 83 id. 530; affd., 178 N. Y. 575, are to the same effect. In *Matter of Hess*, 110 App. Div. 476, the court said that the transfer tax is imposed upon the right of succession and not upon property. In *Matter of Heiser*, 85 Misc. Rep. 271, and *Matter of Vietor*, opinion reported in Chrystie on Inheritance Tax, 714, I had occasion to consider this question, and I then held that the Transfer Tax Act does not apply to a transfer *inter vivos* made for a valuable consideration. The dictum of Chief Justice Cullen in *Matter of Keeney*, 194 N. Y. 281, while entitled to great

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weight as indicating that there might be a question as to whether the Transfer Tax Act applied exclusively to voluntary transfers or gifts, is nevertheless not an authority for the proposition that the act applies to transfers made for a valuable consideration. That question was not before the court for determination, and the learned chief justice expressly refrained from deciding it. As I consider that the decisions above quoted are conclusive upon the question, so far as this court is concerned, it is unnecessary for me to refer to the constitutional objections that might be raised to a statute which attempted to impose a tax upon the transfer of property effected by a contract or agreement executed for a valuable consideration.

The order fixing tax will be affirmed.

Order affirmed.

Matter to Adjust the Transfer Tax upon the Estate of CAROLYN F. MORGAN, Deceased.

(Surrogate's Court, New York County, May, 1916.)

Domicile — how determined — wills — probate of will not conclusive adjudication of last place of residence of testatrix.

The status of a widow, for the purposes of the Transfer Tax Law, is determined by her residence in fact at the time of her death.

In a proceeding under the Transfer Tax Law the place of probate of a will is not a conclusive adjudication as to the last place of residence or last domicile of testatrix.

PROCEEDING under Transfer Tax Law to appraise and assess a tax upon a transfer under a will.

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Lord, Day & Lord (Lucius H. Beers, of counsel), for executors.

Charles T. Kunkel, for state comptroller.

FOWLER, S. This is a proceeding under the Transfer Tax Law to appraise the property of the decedent and to assess a tax upon its transfer under her will. The executors contend that the decedent's last legal residence or domicile was in Washington, D. C., and consequently that the transfer of her intangible property in this state is not subject to a transfer tax imposed by this state. The state comptroller, on the other hand, contends that the decedent had her last residence or domicile in this state, and consequently that the transfer of her personal property, wherever situated, is subject to a transfer tax imposed by this state. Testimony was taken before the transfer tax appraiser upon the question of decedent's last residence or domicile, and the state comptroller and the executors have stipulated that such testimony may be considered by the surrogate in determining the question put at issue in the same manner and with the same effect as if the witnesses had appeared before me.

Let me remark at the outset that this matter involves propositions of some nicety, and that in so far as the application of legal principles to controverted facts is concerned the cause is not free from difficulty. It involves the last domicile, or the last legal "residence" rather, of a widow. The legal domicile of a woman is oftentimes a more complicated question than that of a man who votes and exercises all the prerogatives and rights of a citizen in a particular state or territory.

By reason of the "due process" clause of the Fourteenth Amendment to the Federal Constitution, and

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because of the fact that state laws do not operate beyond the precincts of its territory, a state is disqualified from levying taxes on property out of its jurisdiction. The right to tax depending as it does upon the actual or constructive presence of property within a particular state, it follows that an owner of personal property, now domiciled or residing within this state, cannot be made liable for a tax on such personalty as in law follows his person to his foreign residence or domicile. *Dewey* v. *Des Moines,* 173 U. S. 193; *Corry* v. *Baltimore,* 196 id. 466. The principle "*mobilia sequuntur personam*" is as binding on the state as it is on the courts of the state. The exceptions to this principle are limited and do not arise here. Judge Cooley remarks, tersely, in substance, that where the state affords no protection, there is no equivalent received by the nonresident and no basis for taxation. 1 Cooley Tax. 84. This statement is recognized in this jurisdiction. In *Dorwin* v. *Strickland,* 57 N. Y. 492, it was held that the assessors had no jurisdiction to assess a nonresident. Thus residence, constructive or actual, or protection, are the bases of all taxation of personal property by a state of the Union.

The adjudications in the state of New York in reference to domicile and legal residence are not many. In some directions the law of this state bearing on domicile and residence may be affirmed not to be explored. In other words, it is still *in vacuo,* or waiting to be filled up by the usual judicial processes of analogy and induction. The ultimate and usual reservoir — the old common law — hypothetically in force in New York, and continued as part of our state jurisprudence by constitutional limitation, does not, in any complete measure, fill the void, as prior to our independence of the crown the old common law itself was

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not very explicit or complete on such questions as are suggested by the technical terms "domicile" and "residence." It is only in the modern English cases, which are of course no authority here, however respectfully we may regard their reasoning, that we find the common law relating to domicile and residence tolerably complete. In England of late years the legal contentions, whether a particular legal domicile is in England, or in Scotland, or in England or in India, or in England or the colonies, as the case may be, have been frequent and well considered. But as before remarked these adjudications are devoid of authority in this jurisdiction.

In most of the cases in this court involving an issue of domicile or residence, domicile or residence is treated as a mere question of fact. But such issues of fact nearly always involve the application of legal principles, sometimes extremely nice in character. It would have much facilitated the surrogate of this county had our own law on this head been more complete and better settled than it is.

When it appears that a person has exchanged a domicile of origin or of established choice for a new one in proceedings by the sovereign of the old domicile against that person, it is held that the *onus* of making out a new domicile is on the person or his representatives and not on the state. A once established domicile, either of origin or of choice, is presumed to be permanent in the absence of proofs to the contrary. *Matter of Robitaille,* 78 Misc. Rep. 108, 110. While this is undoubtedly an accurate proposition of law, yet, for the reasons already stated, it is a rule of procedure only, that is, a rule of going forward. On the whole issue of residence or domicile the *onus* is on the state to show by a preponderance of evidence that the individual is amenable to the tax levied. In other words,

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a mere sojourner, or one *in itinere,* or one merely in this jurisdiction for the time being, is not compelled to show by a preponderance of proofs as against the state that he or she is not a resident. The burden on the whole case is always in the last resort on the actor in any legal proceeding. The state, when actor, is no exception. In any form of free government the rights of the individual are not to be unduly jeopardized by presumptions in favor of the sovereign.

But, as already said, the state of New York has the abstract power and right to tax under our federal and state laws all those who are actually residing *animo manendi* within its jurisdiction, and also the right to tax those who are not residents to the extent of property in receipt of its protection in some form. The second justification for the imposition of a tax is not, however, involved in this proceeding. When actual residence is the ground of the imposition of a tax the power to tax ceases at any moment residence ceases. As the publicist Wheaton, quoting a judicial utterance, observes: "The character that is gained by residence ceases by nonresidence. It is an adventitious character and no longer adheres to one from the moment he puts himself in motion *bona fide* to quit the country *sine animo revertendi.*" In these days every person *sui juris* is at liberty to change his domicile or residence whenever he pleases. *Matter of Newcomb,* 192 N. Y. 238, 252; *Matter of Robitaille,* 78 Misc. Rep. 108, 112. The moment legal residence ceases the state's right to tax on the basis of residency also ceases, no matter how inconvenient and apparently unjust it may seem to the taxing agents of the state, or to the *quasi* informers who, I believe, act for the state in most of these exceptional cases on a contingent basis.

But in this matter it appears that Mrs. Morgan's residence in the city and county of New York had not

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ceased at the time of her death. Her mere intention to have her legal domicile in Washington, D. C., perhaps did not conflict with her actual residence in this county. *Matter of Newcomb,* 192 N. Y. 238, cited in *Matter of Rutherford,* 88 Misc. Rep. 419. To my mind the fact that the rights of succession of her heirs or next of kin or heirs to her estate were determined by the laws of the District of Columbia does not exempt her estate from the tax imposed on one dying a resident of this state. I am still of the opinion that by the public law a decree of probate is not an adjudication of domicile. See cases cited, *Matter of Mesa y Hernandez,* 87 Misc. Rep. 253; *Matter of Horton,* 169 App. Div. 292, 295; *Overley* v. *Gordon,* 177 U. S. 214. If it were otherwise the right to inheritance taxes would always depend on the law which regulates succession, which I do not understand to be the fact. But now let me proceed to review more definitely the pertinent facts which I deem to be disclosed in the record now before me.

From the testimony given before the appraiser in this matter, and now laid before me, it appears that the decedent and her husband had their domicile of origin or prior choice in this state for many years before 1879, but that in the latter year they purchased a house in Washington, removed there, and continued to reside there until the date of Mr. Morgan's death, which occurred in 1886. That the decedent acquired a new domicile or residence in Washington after she and her husband went to live there is not and cannot be disputed. This was a new domicile of choice, and thus we have one certain or fixed premise in this cause. The decedent inherited from her husband the house which they had lived in at Washington, and she continued to own that house until the date of her death. But Mrs. Morgan occupied the Washington house as her home only until 1905, when she bought a new house situated

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at No. 70 Park avenue, in the city of New York. She thereafter rented the Washington house and used the Park avenue house as her town house. She continued to rent the Washington house and to occupy the Park avenue house until the date of her death. She never lived at the Washington house after 1905, except for a few days, while she was making arrangements for reletting it to new tenants. It does appear that Mrs. Morgan did not reside during the entire year at No. 70 Park avenue in this city. She lived there about six winter months of the year; the remaining months of each year she spent in Europe or in visiting relatives and friends. She owned the furniture in the Park avenue house, engaged and paid the servants, and conducted it generally as her place of residence or home. It however appears that at various times, after the decedent had purchased the house at No. 70 Park avenue, she executed legal documents in which she described herself as a resident of Washington, in the District of Columbia. Some of these documents were executed as late as May 3, 1913. She died on the 4th of August, 1914, and her will was admitted to probate in the District of Columbia.

There is no doubt in my mind that Mrs. Morgan desired to have her legal domicile, with all its advantages, in Washington, D. C., and at the same time she wished to resume her original residence in New York. The Scotch law, it may be observed at this point, makes a subtle distinction between a physical and an intellectual residence. As a matter of fact, Mrs. Morgan did resume her old physical residence in this state and in this county, and while so resident she died. It may be that Mrs. Morgan was entitled to have her legal or intellectual domicile continue in Washington and yet reside here. Upon this abstract point I express no opinion at this time. But, as I endeavored to show in

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Matter of Martin, 94 Misc. Rep. 81, "domicile" and "residence" are not always convertible terms in law. Frequently in statutes these terms are made synonymous. At other times the terms denote inconsistent conceptions. At all times, however, legal principles involving domicile throw great light on issues of a *de facto* or a *de jure* residence. I have not hesitated to resort to the principle of domicile in various adjudications on residence made by me in this court. In *Matter of Martin* I pointed out at some length that the Transfer Tax Act employed the term residence, and not the term domicile. I refer to my adjudication in that matter only to that extent, as the judgment itself did not commend itself to my superiors.

In the matter now before me there is very little contention as to the fact that Mrs. Morgan at the time of her death was actually physically resident in the city of New York and that her sojourns elsewhere were not in law tantamount to residence. Thus it happened that she received for the last years of her lifetime all the protection which the sovereignty of the state of New York affords to residents. In my judgment her estate is subject to tax, because she died a *de facto* resident of the state of New York. I am convinced that Mrs. Morgan's last legal residence was in the city, county and state of New York, and I so hold.

Decreed accordingly.

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Misc.] Surrogate's Court, New York County, May, 1916.

Matter of the Estate of JOHN H. BROWNING, Deceased.

(Surrogate's Court, New York County, May, 1916.)

Wills — power of sale not exercised — when widow entitled in transfer tax proceeding to have value of dower deducted from appraised value of real estate.

Executors and administrators — when not entitled to commissions — taxable assets.

Where the personal property of a testator is ample to set up a trust fund for the benefit of his son, his widow, to whom was devised all of testator's real estate subject to the executors' power of sale which has not been exercised, is entitled in a transfer tax proceeding to have the value of her dower deducted from the appraised value of the real estate, testator indicating no intention to deprive her of dower.

The executors are not entitled to commissions unless they exercise the power of sale and such commissions should not be deducted from the taxable assets of the estate at this time.

APPEAL from an order assessing and fixing the transfer tax.

Deyo & Bauerdorf (Joseph F. McCloy, of counsel), for appellant.

Aron L. Squiers, for state comptroller.

FOWLER, S. The executrix of decedent's estate has taken this appeal from the order entered upon the appraiser's report and contends that the appraiser erred in refusing to deduct the value of the widow's dower from the real estate of which the decedent died seized. The appraiser found that the value of decedent's real estate in this state was $233,375.

The decedent gave to his executors the sum of

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$300,000 in trust to pay the income to his son during his life; all the rest of his estate he gave to his wife. The personal property is sufficient to set up the trust fund for the benefit of decedent's son. As the real estate, therefore, is not given to trustees, but to the widow absolutely, and the will contains no provision which would indicate that the decedent intended to deprive his wife of her dower, she is entitled to have the value of her dower deducted from the value of the real estate devised by the will of the decedent. *Lewis* v. *Smith*, 9 N. Y. 502; *Konvalinka* v. *Schlegel*, 104 id. 129; *Hortsmann* v. *Flege*, 172 id. 384; *Matter of Weiler*, 122 N. Y. Supp. 608; affd., 139 App. Div. 905.

The executors also contend that the appraiser erred in refusing to deduct from the assets of the estate the executors' commissions on decedent's real estate. The decedent gave his executors power to sell his real estate, but this power was not imperative; the real estate was devised to decedent's wife subject to the executors' power of sale. The power has not yet been exercised, and the payment of legacies or the administration of the estate does not render it necessary that the power should be exercised. At the present time the executors are not entitled to commissions, nor will they be entitled to such commissions unless they exercise the power of sale; therefore such commissions should not be deducted from the taxable assets of the estate at this time. If the executors should sell the real estate they may apply to this court for a modification of the order fixing tax, so as to provide for the deduction of their commissions upon the real estate actually sold by them.

The appraiser erred in refusing to deduct from the New York assets the debts and administration expenses in this state. *Matter of King*, 71 App. Div. 581; *Matter of Grosvenor*, 124 id. 331.

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The order fixing tax will be reversed and the appraiser's report remitted to him for correction, as indicated.

Order reversed.

Matter of the Estate of JAMES J. GOODWIN, Deceased.

(Surrogate's Court, New York County, May, 1916.)

Executors and administrators — when entitled to have commissions deducted upon entire estate — transfer tax.

Executors, in a proceeding to fix a transfer tax, are entitled to have deducted their commissions upon the entire estate and also commissions upon such portion of the estate constituting a trust fund to be held for testator's wife.

APPEAL from an order assessing and fixing the transfer tax.

Zabriskie, Murray, Sage & Kerr (George Zabriskie, of counsel), for executors.

Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for State Comptroller.

FOWLER, S. The executors of the decedent's estate have appealed from the order fixing tax, and contend that the appraiser erred in refusing to deduct trustees' commissions from the assets of the estate in ascertaining the value of the taxable interests of the legatees. The appraiser deducted executors' commissions, but refused to deduct in addition thereto the commissions claimed by the executors in their capacity as trustees.

The testator directed the payment of his debts and funeral expenses and then bequeathed certain articles of personal property to his wife. He also bequeathed to her " ten one-hundredths of all the rest, residue and

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remainder" of his estate, "provided she survive me for the period of one year." He gave thirty-six one-hundredths of his estate to "those of the executors of this will who shall accept the office of trustee" in trust to pay the income thereof to his wife, quarterly, during her life; upon her death he gave the said thirty-six one-hundredths to Walter L. Goodwin, Philip L. Goodwin and Henry S. Robinson in trust to collect the income and pay it quarterly in equal portions to his three sons. It is apparent from the language of the will that the testator contemplated separate duties for his executors and trustees. As executors it was their duty to collect the assets of the estate, pay the debts and general legacies, divide the residuary estate in accordance with the directions contained in the will, then pay the aliquot parts to the legatees entitled thereto, and the remaining thirty-six one-hundredths to such of the executors as signify their willingness to act as trustees of this fund. They are therefore entitled to commissions as executors upon the entire estate, and to commissions as trustees upon the thirty-six one-hundredths constituting the trust fund directed to be held for the benefit of his wife. The two trustees, however, who hold the trust fund during the life of decedent's wife are not entitled to extra commissions for acting as trustees of this fund after her death and prior to the termination of the three trust funds into which it shall be divided, but Henry S. Robinson, who is designated by the testator to act as trustee of the trust fund after the death of the testator's wife, is entitled to full trustee's commissions upon the value of the trust fund which will be received and paid out by him.

The appraiser also erred in ascertaining the value of the surviving life estate of each of the decedent's sons in the trust fund held for the benefit of decedent's wife during her life. The interest of each of the sons

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in this fund is a surviving life estate in one-third thereof, and not a surviving life estate in twelve one-hundredths thereof as reported by the appraiser.

The order fixing tax will be reversed, and the report of the appraiser remitted to him for correction as indicated.

Order reversed.

Matter of the Estate of JAMES NEIL, Deceased.

(Surrogate's Court, New York County, May, 1916.)

Wills — when admitted to probate as will of personal property may be also admitted as will of real property.

Where a will relating to both real and personal property is probated as a will of personal property only, it may, on allegations that at the time it was offered for probate proponent was ignorant of the existence of any real property, be admitted to probate as a will of real property also.

PROCEEDING upon the probate of a will.

Blandy, Mooney & Shipman, for petitioner.

Frank H. Richmond, for contestant James Neil, Jr.

Harold A. Callan, for contestant Virginia Lockwood.

Wilbur Larremore, special guardian for Violet Neil.

FOWLER, S. This is a probate proceeding for the probate of the will of testator as a will of real property and comes before me on objection to probate. This same will was admitted to probate by a decree of this court on July 3, 1915, as a will of personal property. 90 Misc. Rep. 537. The present proceeding is brought,

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so the petition alleges, for the reason that at the time the will was originally offered for probate the proponent was ignorant of the existence of any real property. The will in its terms bequeaths and devises personal and real property. Upon the hearing counsel for the contestant waived the proof of *factum* and agreed that the testimony be closed. The main objection urged by contestant is that the former probate proceeding is a bar to this proceeding. With this I do not agree. The objections are dismissed. Present decree admitting the paper propounded as a will of real property.

Probate decreed.

Matter of the Estate of JOSEPH W. HARPER, Deceased.

(Surrogate's Court, New York County, May, 1916.)

Executors and administrators — accounting — legacy — wills — Statute of Limitations.

Among the papers of a testator who died in 1896, bequeathing $1,000 to his sister, the executors found a note for $1,000 dated September 16, 1886, signed by her and payable to testator. The executors filed their account in 1900, but no action was brought to compel the payment of the note and the decree on accounting, which made no provision for the payment of the legacy, expressly provided that the executors should retain a certain sum to pay any judgment which might be obtained in any action or proceeding brought to recover the legacy. On the judicial settlement of the account of the executors, on their request for instruction as to whether they should pay the legacy to the legal representatives of testator's sister who died in 1914, held, that the court could not make a judicial determination of the issue; that the executors must be left to their own discretion as to the advisability of paying the legacy or settling their account upon the assumption that the legacy had been satisfied, or was barred by the Statute of Limitations.

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Misc.] Surrogate's Court, New York County, May, 1916.

PROCEEDING upon the judicial settlement of the account of executors.

Olin & Phelps (W. G. Murphy, Jr., of counsel), for executors, petitioners.

Crawford & Tuska (Benjamin Tuska, of counsel), for Elsie Dodge Pattee as executrix, claimant.

William Spoerle, for Olive E. Grismer as general guardian of Joseph Harper, infant.

FOWLER, S. The executors have filed their account and ask the surrogate for instructions as to whether they should pay a certain legacy of $1,000.

The testator died in 1896, leaving a will by which he bequeathed $1,000 to his sister, Emma Harper Dodge. The executors found among the testator's papers a promissory note for $1,000, dated September 16, 1886, signed by Emma Harper Dodge, and payable to the testator. They filed their account in 1900, but no action was brought to compel the payment of the note and no provision was made in the decree for the payment of the legacy of $1,000. The decree expressly provided that the executors should retain the sum of $2,500 to pay any judgment which might be obtained by Emma H. Dodge in an action or proceeding brought to recover the legacy. No proceeding was brought in this court to compel the payment of the legacy, and the executors now ask the court for instructions as to whether they should pay it to the legal representative of Emma Harper Dodge, the latter having died in 1914.

The court cannot authorize the executors to pay the legacy or to refuse payment thereof, as the question is not properly before the court at this time. If the representative of the deceased legatee should bring a pro-

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ceeding to compel the payment of the legacy, the executors could interpose any defense to which they considered themselves entitled, and the surrogate could then determine the question as to whether the legacy should be paid. But in this proceeding there is no issue upon which the court can make a judicial determination, and the executors must be left to their own discretion as to the advisability of paying the legacy or settling their account upon the assumption that it has been satisfied or barred by the Statute of Limitations.

Decreed accordingly.

Matter of the Probate of the Paper Propounded as the Last Will and Testament of PETER CAFFREY, Deceased.

(Surrogate's Court, New York County, May, 1916.)

Wills — opinion of expert excluded — undue influence — evidence.

The opinion of an expert as to the genuineness of a testator's mark properly excluded.

Undue influence always imports coercion destructive of testator's volition or freedom of will and is tantamount to force or fear.

An issue of undue influence should not be left to the jury unless reasonable evidence is given that the person charged had influence over testator and exercised it to the extent of coercion and that such exercise was the *causa causans* of the alleged will.

MOTIONS for a new trial and judgment in a probate proceeding.

Murray, Prentice & Howland (Charles P. Howland, of counsel), for proponent.

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Winifred Sullivan, for the contestants.

Edmund J. Tinsdale, special guardian.

FOWLER, S. The motions for a new trial and judgment having come on to be heard, pursuant to the practice directed in this court (*Matter of Dorsey,* 94 Misc. Rep. 566), after deliberate consideration I have been unable to find any exceptions which warrant the granting of a new trial. The surrogate in every probate cause tried with a jury is compelled to decide whether or not there is an issue for the jury and whether a verdict against the will would be against the weight of evidence. *Matter of Dorsey,* 94 Misc. Rep. 566.

On the trial no serious point was made about the due execution of the will, and all the contestants' efforts were directed to the plea of undue influence. On the motion for a new trial the insistence seems to be reversed, and the alleged defective execution is given the prominent place. To my mind the execution of the will was fully established and not contradicted. Discrepancies in the testimony of attesting witnesses as to the order of execution are not sufficient to impeach the execution of a will, if the essentials of execution are otherwise established and not controverted. Here was a full certificate of attestation in the usual form used in this jurisdiction. The ceremony of execution was superintended by a lawyer authorized to practice in this jurisdiction. From the attendance of such lawyer there is *per se* some presumption of regularity of execution.

The exclusion of the opinion of the expert, in reference to the genuineness of the testator's mark, was in conformity with the rule, as I understand it, in this state. Marks are not within the reasons assigned for opinion evidence. It would be improper, I think, to take the

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opinion of an expert on the genuineness of a mark made under the circumstances given in evidence in this proceeding.

I now come to the plea of undue influence, upon which, originally, the whole contest was made on the trial. There seems to be an impression among some practitioners in this court that a plea of undue influence can be established in a probate cause by less evidence, or by proofs of a less cogent kind, than those required to establish other defensive pleas in this court. They seem to think that the rules governing the logical relevancy of proofs have no application to pleas of undue influence. It is almost needless to say that this is not the fact. But as juries have come to be employed in the course of the surrogates' preliminary inquisition as to *factum* of will, it is perhaps of fundamental importance that this misconception should be speedily corrected, or great injustice may result to testators and to the testamentary power in general. Unless on trials of this kind held with juries the judge restrains the evidence within legal bounds I can conceive of no greater wrong to the testamentary power. It must be remembered that the right to make a will is still in force in this jurisdiction. Loose juridical notions and doctrines upon the nature of the plea or the proofs of undue influence will tend to disturb the right still conferred to make a will. This is *a fortiori* so now that this subtle and highly specialized plea is to be dealth with by common juries on the probate.

In *Matter of Hermann,* 87 Misc. Rep. 476, 481; affd. above, I took occasion to point out with some care that a plea of undue influence always imports coercion or compulsion of the mental states of testator in respect of the act of will, and in substance that unless the proof of coercion was sufficient and cogent the plea of undue influence was not made

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out in law. My opinion was fortified by authority, and it was affirmed on appeal. But I will not rest on any adjudication of my own. Undue influence has been defined in the country whence we derive our testamentary common law as influence of such a nature that the volition of a testator is subjected to the coercion or domination of another person. *Parfitt* v. *Lawless* (1876, L. R.), 2 P. & M. 462; *Wingrove* v. *Wingrove* (1886), 11 P. D. 81; *Baudains* v. *Richardson* (1906), A. C. 184, 185, per Lord Macnaghten. And see other cases cited in Powles & Oakley Probate (4th ed.), p. 36, n. P.

Coercion is at all times the essence of undue influence. In a number of adjudications in this court I have cited the leading decisions of our own courts reaffirming in substance the common-law doctrine that coercion is the essence of undue influence. *Matter of Hermann,* 87 Misc. Rep. 476; *Matter of Van Ness,* 78 id. 599. A controlling definition of undue influence in testamentary causes is contained in *Gardiner* v. *Gardiner,* 34 N. Y. 161, and it is in strict conformity with the testamentary common law already cited.

Our superior courts in common with superior courts elsewhere have held that undue influence may be made out by what is called circumstantial or indirect evidence, as it is not always possible to prove undue influence by direct evidence. *Rollwagen* v. *Rollwagen,* 63 N. Y. 519. There are doubtless some unguarded, and, I think, unjustified expressions, largely *obiter dicta,* that such proofs should be liberally received by the trial court. But be this as it may, our courts have nowhere said that any circumstance, or any misconduct, or any misbehavior on the part of any beneficiary taking under the will is a circumstance which may be adduced to establish undue influence. A circumstance or item of evidence which does not logically bear on

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coercion of the testator's mental states in and about the very act of will is not entitled to be given in evidence on the trial of an issue of undue influence. *Boyse* v. *Rossborough,* 6 H. L. Cas. p. 51.

Undue influence is never presumed from the mere situation of the parties, or from the fact that the party alleged to have wielded the undue influence benefits by the testament in controversy. *Boyse* v. *Rossborough* (1857), 6 H. L. Cas. p. 49, per Lord Cranworth; *Parfitt* v. *Lawless, supra; Spiers* v. *English* (1907), p. 24. To maintain the contrary is, in reality, to cast the *onus* in the first instance in every probate cause on those preferred by a will to disprove undue influence. Now our courts have repeatedly said that mere opportunity to exercise undue influence does not establish the allegation of coercion. *Matter of Gihon,* 44 App. Div. 621, 622; *Seguine* v. *Seguine,* 3 Keyes, 669; *Cudney* v. *Cudney,* 68 N. Y. 149, 152; *Matter of Mondorf,* 110 id. 456. Yet much of the proofs ordinarily offered to support pleas of undue influence are addressed to opportunities to commit the offense. The decisions last indicated were only in conformity with Lord Chancellor Cranworth's celebrated judgment in *Boyse* v. *Rossborough,* 6 H. L. Cas. p. 51, where he said: "In order to set aside the will of a person of sound mind it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been attained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis. The undue influence must be exercised in relation to the will itself." Cited at length in Tristram & Coote's Probate Pr. (14th ed.) 412.

It is too often forgotten in probate causes that the coercion which is always the basis of undue influence in probate common law must be exercised in relation to the will itself. It is not sufficient to prove coercion in

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respect of other matters. Mortimer Probate Practice, 78; *Seguine* v. *Seguine,* 3 Keyes, 669; Theobald Law of Wills (6th ed.), 28. The coercion, which is the gravamen of undue influence, and I cannot be too emphatic about this, must be destructive of the free agency of the testator; it must overpower his volition; it must be tantamount to force and fear. Coercion which leaves the testator's judgment free is not sufficient to establish undue influence. Proofs of mere importunity, a general dictatorial conduct of legatees or devisees toward a testator, unless connected with the act of will, are not evidence of that coercion which in testamentary law suffices to destroy the will of an otherwise competent testator. This is especially true when in the act of will a testator is proved to have been surrounded by all those safeguards and precautions which the Statute of Wills in its wisdom makes essential to a valid exercise of the testamentary power.

In almost every will case of importance the attendance of a lawyer of elevated professional character, of disinterested and highly respectable attesting witnesses, summoned by the testator himself to the ceremony of execution, the formal circumspection and deliberation ordinarily attending the execution of a will, in most instances, at least, serve to repel the inference possible from the disconnected circumstances generally adduced in support of the plea of undue influence. These are too often gossip called by the high-sounding name of declarations, or *res gestæ,* of an inconclusive kind. On every trial it is for the surrogate to determine in the first instance whether such proofs are in law sufficient to support a verdict against the will. If he do not, he is highly derelict in his duty. To abandon to a jury proofs consisting of circumstances which may, but which necessarily do not, show coercion in and about the act of will, is practically to

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destroy the testamentary power in the greatest number of cases. It is for this reason that the surrogate should never leave such proofs to a jury. If in law the circumstantial evidence adduced in support of undue influence is insufficient, it is error for the surrogate to leave the case with the jury.

The Irish Probate Law, from its foreign origin, its tradition and its substance, more nearly resembles our own than modern English probate law. It is well said in a leading Irish case: "That a contestant is not entitled to have an issue of undue influence left to the jury unless reasonable evidence is given: That the person charged had influence over the testator; (2) that he exercised such undue influence over him to the extent of coercion; and (3) that the execution of the impeached paper was procured by the exercise of such coercion as the *causa causans* of the act itself." *Purdon* v. *Longford*, 1 L. R. Ir. 80, cited *in extenso* in Miller's Irish Probate Pr. 132. I know of no case in our own books where the correct elements of undue influence are better indicated than in the case just cited. That case also serves to point out the duty of a surrogate in reference to submission of undue influence to a jury. It is that case which I esteemed to be a good and proper example for my action in this case. I believed that that case well expressed the law recognized in this jurisdiction. Motion for a new trial overruled. Motion for probate of the paper propounded, based on the directed verdict of the jury, granted. Settle decree of probate in due form, reciting the submission to the jury and the proceedings for new trial and judgment.

Decreed accordingly.

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Matter of the Appraisal under the Transfer Tax Acts of the Property of ST. CLAIR MCKELWAY, Deceased.

(Surrogate's Court, Kings County, May, 1916.)

Joint ownership — how established — transfer tax — agreement between a husband and wife as to joint ownership of securities — contracts.

Where an agreement made in 1913 between a husband and wife of the first part and a trust company of the other part declares that securities which were the subject of the agreement were owned by the husband and wife jointly such statement is not so unalterably expressive of joint ownership that it could not upon resort to the circumstances be found consistent with ownership in common, but the circumstances tend only to the conclusion that joint ownership was intended and effectuated.

A provision of the agreement "that the same might be revoked" was not applicable to the arrangement by which joint ownership was established but was confined to the recall thereof between the parties thereto.

A stipulation of the agreement that the trustee should pay the income of the securities to the husband and wife in equal shares was not inconsistent with joint ownership, and the only transfer, whether of the securities mentioned in the contract or those which were later brought within its operation, was a transfer consummated in the lifetime of the decedent and was not then subject to a transfer tax, nor did it become so under chapter 664 of the Laws of 1915.

APPEAL from an order imposing a transfer tax.

Cullen & Dykman (Francis L. Archer, of counsel), for Virginia Brooks McKelway, appellant.

Marcus B. Campbell, for state comptroller, respondent.

KETCHAM, S. The widow of the decedent appeals from portions of the order imposing a transfer tax.

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The agreement made, on November 24, 1913, between the husband and wife, of the first part, and the trust company, of the other part, had the present effect of constituting the parties of the first part the owners, by a joint tenancy, of the securities therein described. The subsequent acts of the husband and wife by which they submitted to the operation of the agreement other securities, not mentioned in the instrument, had the same effect, with respect to such other securities.

The parties of the first part declared in the agreement that the securities which were the subject thereof were owned by them "jointly." This statement is not so unalterably expressive of joint ownership that it could not, upon resort to the circumstances, be found consistent with ownership in common, but the circumstances tend only to the conclusion that joint ownership was intended and effectuated. If the declaration were negative, the transaction would denote and immediately create a joint tenancy, with the right of survivorship. *Matter of Maguire,* 95 Misc. Rep. 76.

The provision in the agreement "that the same might be revoked" was obviously not applicable to the declaration or arrangement by which the joint ownership was established. It was confined to the recall of the agreement between the joint owners and the trust company.

The stipulation that the trustee should pay the income of the securities to the husband and wife in equal shares was not inconsistent with joint ownership. It dealt only with the duty of the trustee toward the parties of the first part, and contained no distribution in ownership of the income paid.

Hence, the only transfer, whether of the securities mentioned in the contract or those which were later brought within its operation, was a transfer consum-

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mated in the lifetime of the decedent and was not then taxable under the Transfer Tax Act. It did not become taxable under chapter 664 of the Laws of 1915. *Matter of Lansing*, 182 N. Y. 238; *Matter of Hoffman*, 161 App. Div. 836; affd., 212 N. Y. 604.

The appeal is in all things sustained, and the order may be modified accordingly.

Order modified.

Matter of the Appraisal under the Acts in Relation to Taxable Transfers of Property of the Estate of GRAVES S. SQUIBB, Appellant.

(Surrogate's Court, Kings County, May, 1916.)

Husband and wife — when tenants in common — contracts — evidence — when securities not subject to transfer tax.

Where a husband and wife rent a safe deposit box they are tenants in common of the lease and securities which are the separate property of each placed in the box by one of them remain his or her property unless the ownership be changed by contract.

Where upon the death of the wife there were found securities in the box concededly belonging to her and other securities, which originally belonged to her husband, were in an envelope indorsed to the effect that the contents, life insurance bonds, were the property of the wife, held, that in the absence of proof of delivery of the bonds to the wife and her acceptance thereof for the purpose of making a present gift the ownership of said bonds remained in the husband and were not subject to a transfer tax as a part of the wife's estate.

APPEAL from an order assessing and fixing the transfer tax.

George S. Ingraham, for appellant.

Marcus B. Campbell, for state comptroller, respondent.

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KETCHAM, S. Where husband and wife together rent a safe deposit box and each deposits therein securities which are the separate property of the depositor, no suggestion is thereby supplied either of gift or joint ownership. They own the lease of the box in common and not by joint tenancy. Securities placed by one of them in the box remain his or her property, unless ownership be changed by some contractual act.

In this case there was a box in which, upon the death of the wife, there were found securities which concededly belonged to her and other securities which originally belonged to the husband.

The comptroller claims that these securities, once the husband's, are a part of the wife's estate.

It will be for a moment assumed, but without conviction, that the husband and wife were together the lessees of the box.

There is no basis for a finding that there was joint ownership as to any of the contents of the box. None can be derived from the joint use of the depository. *Matter of Brown,* 86 Misc. Rep. 187; affd., 217 N. Y. 621. This was the effect of the case cited *supra,* in which the facts were largely more suggestive of an understanding between the parties that survivorship should be the result. Indeed, if there were joint ownership solely by reason of the lease, the only effect would be that all the contents would now belong to the husband.

Unless, then, a gift by the husband be shown, there is no basis for any tax. A gift *causa mortis* is excluded. The only evidence upon which it is argued that a gift was made is contained in the fact that the husband's securities were kept in the repository in an envelope endorsed, in his handwriting, "Life insurance bonds, property of Mrs. E. H. Squibb."

Without proof of delivery to the wife and acceptance

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by her, both for the purpose of making a present gift, the ownership of the bonds in the envelope remains to this day in the husband. No such evidence is supplied by the legend which he put upon the envelope. The appeal is sustained.

Order affirmed.

Matter of the Petition of ANNA M. GEBERT, to Render Her Account as Administratrix of JOHN JACOB GEBERT, Deceased.

(Surrogate's Court, Kings County, May, 1916.)

Mutual benefit societies — beneficiary named in certificate has no vested interest in same — executors and administrators — associations.

In the absence of any provision on the subject in the laws of a mutual benefit society the beneficiary named in a certificate issued to a member has no vested interest in the same which might in a contingency become payable on the death of said member.

The account of an administratrix, so far as it fails to charge her with a sum received on a certificate of benefit insurance from a society which insured the life of her decedent, approved.

PROCEEDING upon the judicial settlement of the account of an administratrix.

Charles Oechler, for accountant.

John Gerdes, for objectants.

KETCHAM, S. "By the weight of authority, in the absence of any provision on the subject in the laws of the society or in the certificate of insurance, the beneficiary in a mutual benefit certificate has no vested right therein during the lifetime of the member, and his con-

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tingent interest therein expires on his death; hence if he predeceased the member neither his personal representatives nor next of kin nor his legatees become entitled to benefits on the member's subsequent decease." 29 Cyc. 157, and cases cited from various jurisdictions. Additional authorities to the same effect are to be found in the following treatises: Niblack Accident Ins. & Ben. Soc., § 202; 1 Bacon Ben. Soc. & Life Ins., § 243 *et seq.*

The rule contained in the foregoing quotation must be regarded as settled, though it has not been reached without judicial uncertainty and strife.

In the strict contract of life insurance, not involving the features of membership in the underwriting body, the beneficiary takes a vested contractual interest in the fund assured. This is held to be a chose in action of which the assured cannot be divested without his consent. The occasional rulings that the beneficiary of a membership insurance takes a vested right in the contract may, perhaps, have followed the decisions which were confined to the case of a pure policy of life insurance, and may have proceeded without due thought of the distinction between the two classes of insurance contracts. This distinction is defined and elaborated by Judge Werner in *Shipman* v. *Protected Home Circle,* 174 N. Y. 398, 407.

His observations make it plain, not only for the purposes to which they were immediately applied, but for the solution of the present dispute, that under the contract effected between a membership corporation and its member, by which a person is appointed as the beneficiary of insurance, to be paid by the corporation, "the appointee has no vested interest in the sum which might in a contingency become payable on death of a member."

The account, so far as it fails to charge the admin-

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istratrix with the sum received from the society which insured the life of the decedent, is approved.

The decree will embody this result, together with the dispositions made upon the trial.

Decreed accordingly.

LOUIS COHEN, ABRAHAM COHEN and ROBERT P. GREENKY, Copartners, Doing Business under the Firm Name and Style of COHEN BROS. AND GREENKY, Plaintiffs, *v.* JOHN P. WALWORTH, CHARLES W. WALWORTH and JOHN E. WALWORTH, Copartners, Doing Business under the Firm Name and Style of WALWORTH BROS., Defendants.

(City Court of the City of New York, Trial Term, May, 1916.)

Contracts — when court may not change terms of — damages — evidence.

A court may not change the terms of a contract even though it may be a harsh and unreasonable one; nor will the dictates of equity be followed if by so doing the contract will be ignored, for however onerous it must be enforced according to its terms.

Where in an action to recover damages for failure to deliver merchandise defendant fails to offer evidence tending to show that certain conditions, terms, and specifications printed in small letters at the top of the order and above the description of the merchandise, that all terms of sale and deliveries were set forth in the copy of the order, were at any time called to the attention of plaintiffs or that they had accepted them, such conditions are not binding upon them.

ACTION to recover damages.

I. Gainsburg, for plaintiffs.

Allen T. Hopping, for defendants.

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FINELITE, J. This is an action brought by the plaintiffs to recover of the defendants alleged damages suffered by reason of the defendants failing to deliver merchandise as purchased by the plaintiffs in pursuance of an agreement entered into and had between them. At the close of the trial both sides moved for a direction of a verdict, and as the court was about to direct a verdict both sides consented that the court may reserve its decision upon the question of law involved and direct a verdict in accordance with the law and the evidence adduced upon the trial hereof. It appears from the facts herein that between the 3d and 15th days of December, 1915, the parties hereto entered into an agreement wherein and whereby the plaintiffs agreed to purchase from the defendants and the defendants agreed to sell and deliver to the plaintiffs a certain kind of merchandise consisting of gabardine, poplins and corkscrews; that said merchandise was to be delivered within a reasonable time; that the same was purchased at a fixed price agreed between the parties; that part of said merchandise was delivered as purchased, and for the nondelivery of the balance the plaintiffs predicated this action to recover damages. The defendants by their answer admit the making of the agreement for the sale of the merchandise referred to; that the balance of said merchandise was tendered to the plaintiffs, but that the plaintiffs failed to perform certain conditions, terms and specifications of the contract on their part, and that they refused to accept or permit delivery of a portion of the said merchandise or pay therefor. A great deal of correspondence was had between the respective parties in reference to the nondelivery of the merchandise, irrespective of the credit which was originally given to the plaintiffs herein for the payment of said merchandise after delivery, the terms being 7-10-60, which

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were lived up to by the plaintiffs until the defendants insisted upon cash being paid before the balance of the merchandise of the original contract would be delivered. The plaintiffs thereupon paid in advance cash for the merchandise as purchased by them before delivery until such time as a serious question arose in reference to the nondelivery of the balance in pursuance of said contract as to whether the merchandise would be merchantable or marketable. The plaintiffs thereupon insisted upon the contract being lived up to, when, for the first time, the defendants raised the question as to certain printed matter upon the agreement which is claimed by the defendants as part of the original contract for the sale of the merchandise and which terms were accepted by the plaintiffs, which will be referred to hereafter. The defendants, as the court recalls, failed to offer evidence in reference to the certain conditions printed on said statement or order or contract (as it may be called), or that the plaintiffs by their correspondence accepted the terms as therein printed as aforesaid, or that the attention of the plaintiffs was at any time called to said printed matter by the defendants in their correspondence in reference to the nondelivery of the balance of the merchandise as agreed to be delivered to the plaintiffs herein, but for the first time this question is raised upon the trial hereof. In referring to those conditions as contained in said agreement, which are printed in small letters at the top of the order and above the description of the color, style, shade and price of the merchandise, which reads as follows: "* * * All terms of sale and deliveries are set forth in this copy of order. If not in exact accordance with conditions agreed upon, it must be returned for correction within *ten days* from its receipt. * * * This order is given and accepted subject to a limit of credit determinable at any time by the

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seller." There is other printed matter above and between these two quotations which has no reference to the issues involved herein. Above and below said quotations are typewritten figures and statements, as well as the names of the plaintiffs, their address and the terms of credit thereon, and also the name of the salesman, all in typewriting, which order or proposal as received by the defendants was confirmed and accepted by them. The serious question that arises is, Are the plaintiffs bound by the typewritten part of the order in reference to the purchase of the merchandise in question, its terms and credit thereon, or are they bound in addition thereto by the small printed matter on said proposal or order where their attention was not called thereto? Nor is it strictly speaking part of the contract, without their attention first being called thereto. It is true and well settled law in reasoning upon this question that: "It is not the province of a court to change the terms of a contract which has been entered into, even though it may be a harsh and unreasonable one, * * * nor will the dictates of equity be followed if by so doing the terms of a contract are ignored, for the folly or wisdom of a contract is not for the court to pass upon. Its terms, however onerous they may be, must be enforced if such is the clear meaning of the language used." *Michaelis* v. *Wolfe*, 136 Ill. 68; *Peck* v. *Scoville Mfg. Co.*, 43 id. 360; *Wheeling P. & B. R. Co.*, 99 Penn. St. 171; *Barhydt* v. *Ellis*, 45 N. Y. 107. In the last named case the Court of Appeals made this clear and succinct statement: "Effect must be given, if possible, to every part of an agreement; and it is only when there is an inconsistency or repugnancy which is totally irreconcilable, that a discrimination will be made as to which part shall be made to yield to the other." But, speaking on this question, Mr.

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Justice Seabury held in *Sturtevant Co.* v. *Fireproof Film Co.*, 216 N. Y. 199, 203, 204, which is analogous to the question involved herein: "In view of the manner in which this provision is printed upon the stationery of the plaintiff it cannot be held, as a matter of law, that it was incorporated in and a part of the proposal. The language of the proposal is clear and explicit, and this provision, which is printed in small type, cannot be allowed to change, alter or modify it, unless it was a part of the proposal. It was not incorporated in the body of the proposal or referred to in it. No suggestion was made, either in the pleadings or the proof, that it was a part of the proposal. If an issue had been raised upon the trial, whether it was a part of the proposal, that issue would have presented a question of fact to be determined by the jury. As no such question was raised upon the trial, and as it does not appear from an inspection of the proposal that this provision was a part of it, the defendant is not now in a position to secure the reversal of this judgment upon this ground. When an offer, proposal or contract is expressed in clear and explicit terms, matter printed in small type at the top or bottom of the office stationery of the writer, where it is not easily seen, which is not in the body of the instrument or referred to therein, is not necessarily to be considered as a part of such offer, proposal or contract. In *Sturm* v. *Boker*, 150 U. S. 312, 327, it was said that 'That contract being clearly expressed in writing, the printed billhead of the invoice can, upon no well settled rule, control, modify or alter it.' In *Summers* v. *Hibbard & Co.*, 153 Ill. 102, 109, the court said: 'The printed words were not in the body of the letter or referred to therein. The fact that they were printed at the head of their letter-heads would not have the effect of preventing appellants from entering into an uncondi-

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tional contract of sale.' In *Menz Lumber Company* v. *McNeeley & Co.*, 58 Wash. 223, 229, it was said that 'The printed matter on the letter-heads was not referred to in either the order or the acceptance, and is not a part of the contract. * * * The construction contended for by the respondent would make that which is an absolute, unqualified acceptance upon its face, a conditional one by reference to a letter-head which was not referred to by either party.'" It seems from the reasoning expressed herein that the defendants having failed to call the plaintiffs' attention to the printed matter in said proposal or contract, and as no evidence upon the trial herein was introduced to the contrary, and the defendants failing to support their answer herein, I fail to see wherein I can do otherwise than direct a verdict in favor of the plaintiffs for the sum of $521.26, with interest thereon, making a total sum of $529.08.

Judgment for plaintiffs.

EMIL KURZWEIL, Plaintiff, *v.* STORY & CLARK PIANO Co., Defendant.

AARON A. BLUMGARTEN, Plaintiff, *v.* MASON & HAMLIN Co., Defendant.

(City Court of the City of New York, Trial Term, May, 1916.)

Replevin — contracts — conditional sales — judgments.
Personal Property Law, §§ 65, 66 — service — jurisdiction — verdict.

Certain pianos sold to plaintiffs herein under contracts of conditional sale were replevied for nonpayment of installments due under the contracts. Defendants in the suit were never served with the summons but the sheriff in his return stated that he took the property from the possession of designated persons, the agents of defendants, and that he served on each of said agents a copy of the summons, affidavit, requisition, etc. Judg-

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ments were entered on such service but no proceeding was thereafter taken to cause a summons to be served on the defendants in the action. Subsequently to the entry of the judgment the property was sold at public auction in the replevin suit. In an action by defendants in the replevin suit to recover moneys paid under and pursuant to the contracts of conditional sales defendants claim to have sold the property in compliance with sections 65 and 66 of the Personal Property Law. Held:

That the court having jurisdiction of the subject matter in the replevin suit the judgments therein entered were regular and conclusive as against the plaintiffs herein until reversed or set aside by direct attack.

In construing section 66 of the Personal Property Law the date of mailing and the date of service must be considered as synonymous, to be excluded in reckoning time, and notice given by mail September seventeen and received the next day for the sale of the chattels on October second gave the full fifteen days' notice as required by said section, and verdict is directed in favor of the respective defendants on the merits.

ACTIONS to recover moneys paid under conditional bills of sale.

Eugene I. Yuells, for plaintiffs.

C. Bertram Plante, for defendants.

FINELITE, J. The above entitled actions are brought to recover the moneys paid under and pursuant to conditional bills of sale for the purchase of pianos. In the *Kurzweil* case the amount sought to be recovered is the sum of $253.08, and in the *Blumgarten* case $175, against the respective defendants. The property was taken from the plaintiffs herein in an action in replevin for the nonpayment of the installments due under said contracts of conditional sale, wherein the plaintiffs herein were the defendants and the defendants herein were the plaintiffs, and the property was

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sold as claimed by the defendants herein in compliance with sections 65 and 66 of the Personal Property Law. There is no dispute as to the facts. It appears pursuant to stipulations herein that the *Blumgarten* contract was executed on the 29th day of December, 1911, and in the *Kurzweil* case the contract was executed on the 6th day of May, 1909. Blumgarten thereafter continued to pay under said contract the installments therein mentioned up to the sum of $175 and omitted to pay any further installments, and Kurzweil paid up to the sum of $253.08. Then actions were instituted in this court by the defendants herein against the plaintiffs herein in replevin, which papers and requisitions were duly delivered to the sheriff of the county of New York, who took possession of said pianos, and in his return made in the *Blumgarten* case states that he took the property from one Margaret Becker, the agent of the plaintiff, in whose possession he found the chattel, and that he served on her a copy of the summons, affidavit, requisition, etc., and a similar return was made in the *Kurzweil* case; that he served the agent therein of said Kurzweil. It is admitted that the plaintiffs herein, being the defendants in the respective replevin actions, were never served with the summons in those actions or with any process of the court. Judgments were thereafter respectively entered in said actions. Notwithstanding that the judgments were entered in said actions on a service made upon the respective agents of the plaintiffs herein, no proceeding thereafter was taken to cause a summons to be served upon the respective plaintiffs herein either personally or by publication. Subsequenty to the entry of said respective judgments the defendants herein sold the chattels at public auction. Two questions arise herein. *First*, have the respective defendants

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complied with sections 65 and 66 of the Personal Property Law? *Second,* whether the nonfailure of the service of the summons and complaint upon the respective plaintiffs herein prior to and before the entry of judgment would entitle the plaintiffs herein to recover the amounts paid respectively upon the contracts of conditional sale in pursuance of sections 65 and 66 of the Personal Property Law. The plaintiffs herein respectively urge that notwithstanding the entry of judgment in the respective actions of replevin brought by the defendants herein, there is no judgment against the plaintiffs in said actions, and that thereby the sale which was conducted by the defendants in those actions entitled the plaintiffs to recover the respective amounts paid under and pursuant to said contract of conditional sale, and, further, that under section 1700 of the Code of Civil Procedure, which provides that in an action in replevin the sheriff may take the property from the agent of the defendant, if found in the possession of said agent, and that he may thereupon deliver to such person a copy of the affidavit, requisition and undertaking, it does not require that a copy of the summons be served upon such agent, and the sheriff's return in these actions that he served a copy of the summons as well as the other papers on the agent of the respective plaintiffs may be deemed surplusage. There are three ways of serving a summons on a defendant in civil actions brought in this state under the Code. With none of these requirements have the defendants herein complied. Judgments were thereafter entered herein upon the affidavit made on the return of the sheriff upon the service made upon the respective agents herein mentioned. It would not be amiss here to state the history of the remedy in replevin (Wait's N. Y. Pr. (2d ed.) 2020–2023), the history and use as a remedy, its origin and

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former use at common law. According to the Mirror, the old action of replevin was devised by Glanvil, Chief Justice to King Henry the Second, for the purpose of affording a remedy against *distress* wrongfully taken. Blackstone assumes that this was the only use made of the remedy, but the position he assumes is evidently not well taken, and is not warranted by the books. The old authorities are that "replevin lies for goods taken tortiously, or by a trespasser, and that the party injured may have replevin or trespass at his election." The action was usually brought to try the legality of a distress, but was not confined to this alone, but would lie for any unlawful taking of a chattel. *Stauff* v. *Maher,* 2 Daly, 142; *Ely* v. *Ehle,* 2 N. Y. 3 Comst., 506; *Pangburn* v. *Partridge,* 7 Johns, 140. *Mason* v. *Dizon,* Sir Wm. Jones, 173; *Bishop* v. *Montague,* Cro. Eliz. 824. The object of the remedy was to restore to the party from whom chattels had been wrongfully taken all of his former right to their control upon the giving of security to prosecute the action, and, in case the right to the property should be adjudged against him, to restore it to the true owner. At common law the party claiming the right to the possession of personal property could enforce his claim by no process other than the writ of replevin, which issued out of chancery, commanding the sheriff to deliver the property to the owner, and afterward do justice in respect to the matter in his own County Court. This form of procedure was attended with two serious disadvantages. As the remedy was chiefly employed in cases of distress, the nature of the property distrained demanded a prompt and efficient remedy to prevent serious loss to the owner. This could not be had at common law. Writs for all England must issue from the office at Westminster, and great delay and inconvenience necessarily attended its employment in dis-

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tant parts of the kingdom. Neither did the defendant in the action receive any valid security for the return of the property, if judgment was given in his favor, and the judgment was in many instances rendered of no effect by the disposal of the property during the pendency of the action. To remedy these defects various statutes were subsequently enacted, calculated to protect the rights of both of the claimants. *Changes by Statutes.* The first essential change was wrought by the statute of Marlbridge, which dispensed with the suing out of the writ, and provided that the sheriff should immediately proceed to replevy the goods upon plaint to him made. And it was further provided by the statute (1 Philip & Mary, chap. 12) that the sheriff should make at least four deputies in each county, for the sole purpose of making replevins. The security to be given on procuring the return of the property was that required by the Statute of Westminster 2 (13 Edw. I., chap. 2). The party replevying was obliged to put in pledges to prosecute the action, and also pledges to return the distress again if the right were determined against him. The sheriff was answerable for the sufficiency of the security taken by him. The statute 11 George II, chapter 19, specified what the security should be in a replevin on a distress for rent, and required that it should consist of a bond, with two sureties, in a sum of double the value of the goods distrained, conditioned for the speedy prosecution of the suit and for the return of the goods. This bond was made assignable to the defendant, and, on being forfeited, could be sued in the name of the assignee. On the receipt of this bond it became the duty of the sheriff to immediately restore the goods to the possession of the party distrained upon, unless the distrainor claimed a property in them. In this contingency the party replevying was

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required to sue out a writ *de proprietate probanda,* in which the sheriff was to try by an inquest in whom the right to the property existed previous to the distress. If the sheriff found this right to be in the distrainor, he could proceed no further, but must return the claim of property to the Court of Kings Bench or Common Pleas, to be there disposed of. Co. Litt. 145. But if no claim of property was made, or if the sheriff's inquest determined it against the distrainor, then the sheriff was to replevy the goods and deliver them to the party replevying, who thereupon brought his action of replevin. Originally at common law the action of replevin lay to recover the possession of goods illegally distrained by a landlord. The primary object of the action was to recover possession of the specific chattels. The form of action was so useful that the action was extended to nearly all cases of unlawful caption or detention of chattels, where it was sought to recover the chattels in specie. In many cases, where the plaintiff was unable to obtain the return of the chattels, he could recover their value in the action. Still, the action remained essentially one to recover the possession of chattels as distinguished from actions in trespass or trover to recover damages for the seizure or for the value of the property. The following, taken from the opinion of Cullen, J., in *Sinnott* v. *Feiock,* 165 N. Y. 446, gives the history of legislation on the subject of replevin in this state:. "There were many technical rules in force relating to this form of action, which at all times made proceedings under it difficult, and in 1788 a statute was passed in this state (1 R. L. 1813, p. 31) to simplify the procedure. It directed the form of plaint before the sheriff in which the plea was 'of taking and unjustly detaining' beasts, goods or chattels. Afterwards the Revised Statutes prescribed the rules governing actions of replevin and the procedure

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therein (title 12, chap. 8, part 3). In the original note of the revisers is stated their intention to so extend the action of replevin 'as to make it a substitute for detinue, and a concurrent remedy in all cases of the unlawful caption or detention of personal property, with trespass and trover.' We do not think the revisers used the term 'concurrent' as meaning 'coextensive,' for by section 6, title 12, it is provided that the action shall in all cases be commenced by writ, the form of which is prescribed as follows * * * The provisions of chapter 2 of title 7 of the Code of Procedure of 1848, entitled 'claim and delivery of personal property,' operated as a substitute for those of the Revised Statues. They direct that at the commencement of the action the plaintiff may replevy the chattels, but in the affidavit to obtain the writ there is required the statement that the defendant 'unjustly detains them.' The provisions of the present Code of Civil Procedure in the article entitled 'action to recover a chattel' (1689–1730), are substantially the same as those of the old Code." If this was an ordinary action *in rem,* and judgments entered thereon on the nonservice of the summons, the court, true, would not have jurisdiction over the parties or subject matter involved, and the defendants thereon would have the right to move to vacate and set aside said judgments on motion or for irregularity, or for error in fact (Code Civil Pro. §§ 1282, 1292), and testimony could be taken upon the question of the nonservice or for the want of jurisdiction, which the court would, no doubt, entertain. *Callahan* v. *Levin,* 153 App. Div. 71; *Sinnott* v. *Hanan,* 156 id. 323, 324. Also in Nichols Practice, volume 3, in discussing the question of procuring judgments to be vacated for error in fact, it says (p. 2817) that for lack of jurisdiction a party is entitled to have a void

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judgment vacated, although it would also be subject to collateral attack, and he says that it is a ground for setting aside such judgment by such procedure that no summons was served, and the learned author also says, at page 2824, that the provision of the Code limiting the time within which motions must be made to set aside judgment for irregularity does not apply to jurisdictional objections, and the learned author cites the case of *Meurer* v. *Berlin*, 80 App. Div. 294, which holds to the effect that a motion to cancel a judgment because of failure to serve a summons may be heard at any time, and that objection based upon nonservice of summons is not based upon an irregularity. The plaintiffs herein, failing to move to vacate the judgments as entered in the replevin actions, have the right to urge that the judgments as entered are not *res adjudicata*, and are at liberty to attack the same collaterally upon the trial herein, which the plaintiffs herein urge. *But where there is a provisional remedy* the court does not lose jurisdiction over the parties or the subject matter involved, as upon the execution of the writs of replevin the court acquires jurisdiction for all purposes. Section 1693 of the Code provides jurisdiction, etc., when replevin precedes summons: "Where a chattel is replevied before the service of the summons, as prescribed in this article, the seizure thereof by the sheriff is regarded as equivalent to the granting of a provisional remedy, for the purpose of giving jurisdiction to the court, and enabling it to control the subsequent proceedings in the action; and is equivalent to the commencement of the action, for the purpose of determining whether the plaintiff is entitled to maintain the action, or the defendant is liable thereto." True, the seizure of the chattels by the sheriff under the writ of replevin is regarded, first, as equivalent to the granting of a provisional remedy for the purpose

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of giving jurisdiction to the court and enabling it to control the subsequent proceedings in the action; second, as equivalent to the commencement of the action for the purpose of (a) determining whether the plaintiff is entitled to maintain the action, or (b) the defendant is liable thereto, as "the issue to be determined in a replevin action is the present right to the possession of the property in controversy as aforesaid." Section 1700 of the Code of Civil Procedure, as to how chattels are to be replevied, reads as follows: "If any chattel described in the affidavit is found in the possession of the defendant or of his agent, the sheriff, to whom an affidavit, requisition and undertaking are delivered, as prescribed in the foregoing sections of this article, must forthwith replevin it by taking it into his possession. He must thereupon without delay serve on the defendant a copy of the affidavit, requisition and undertaking by delivering the same to him personally if he can be found within the county or, if he cannot be so found, to his agent, if any, from whose possession the chattel is taken, or if neither can be found within the county, by leaving a copy at the usual place of abode of either with a person of suitable age and discretion." The sheriff having complied with this provision gave the court complete jurisdiction so as to enable the court to control the subsequent proceedings in the action. It was equivalent to the commencement of the action for the purpose of determining whether the plaintiff was entitled to maintain the action or the defendant was liable thereto. 2 Wait's N. Y. Pr. (2d ed.) 2025; Code Civ. Pro. § 1694. The court having jurisdiction over the subject matter involved herein, it also had the inherent power to enter judgment thereon. It is provided by section 416 of the Code of Civil Procedure that from the time of the granting of a provisional remedy the court acquired jurisdiction and has con-

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trol of all subsequent proceedings. This section must be read in connection with section 1693 of the Code of Civil Procedure as hereinabove quoted. The cases on the question of the jurisdiction obtained by the use of a provisional remedy apply to the jurisdiction obtained by the court and its control of all subsequent proceedings where the requisition has been executed before the service of the summons in the action. As was said in *Acker* v. *Hautemann,* 27 Hun, 48: "The error of the sheriff in not delivering the summons with the other papers was not fatal to the jurisdiction of the court. That jurisdiction is preserved by section 1693 of the Code, when read in connection with section 416. The action was brought to recover possession of personal property, and the effect of the neglect of the sheriff to make service of the summons was that the chattels were replevied before the service of the summons. The seizure, therefore, must be deemed as equivalent to the granting of a provisional remedy for the purpose of giving jurisdiction to the court and enabling it to control the subsequent proceedings in the action, and as equivalent to the commencement of the action for the purpose of determining whether or not the plaintiff had a right to maintain the action, or the defendant is liable thereto." In an action in replevin, as distinguished from an action in trover, in the first instance, the goods are claimed as those of the plaintiff, and where the defendant does not come in and rebond or reclaim the chattels the court retains jurisdiction to determine the disposition of the property, and that is what is done by the judgment in the action, the court retaining jurisdiction for the purpose of awarding, by its judgment, the property to the plaintiff in that action, and the judgments thus entered in said actions are valid and enforcible until the plaintiffs herein move the court to vacate the same

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upon the ground of irregularity or attack the jurisdiction of the court; whereas in an action in trover the plaintiff does not seek possession of the property, but seeks to recover its value. In such an action the plaintiff treats the chattel as having been sold and seeks to recover the value of the article, abandoning its possession to the defendant and pursuing him for the value. This distinction between an action in replevin and one to recover damages for the conversion of the chattel is recognized and approved in *Allen* v. *Fox,* 51 N. Y. 562. The provisions of the Code of Civil Procedure relating to the action of replevin may be considered as a substitute for the provisions of the Revised Statutes. The court fastens upon the identical property and holds it subject to the final determination of the action. During the time the personal property is thus held it is said to be *in custodia legis. First National Bank of Oswego* v. *Dunn,* 97 N. Y. 149. The issue to be determined in a replevin action is the present right to the possession of the property in controversy. *Roach* v. *Curtis,* 191 N. Y. 387, affg. 115 App. Div. 765; *Sinnott* v. *Feiock,* 165 N. Y. 444; *Wheeler* v. *Allen,* 51 id. 37; *Alaske Unterstuetzung Verein* v. *Wall,* 28 Misc. Rep. 174; *Mahr* v. *Livingstone,* 55 id. 133. As hereinabove pointed out, immediately upon the seizure by the sheriff of the property under the requisition, the court obtained jurisdiction under section 1693 of the Code of Civil Procedure, which enabled it to control the subsequent proceedings in the action. The writ once executed was equivalent to the commencement of the action for the purpose of determining whether the plaintiff is entitled to maintain the action or the defendant liable thereto, and the court having obtained jurisdiction and for the failure to serve the defendant herein, the entry of the judgment thereupon is merely an irregularity, which would be

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binding upon the plaintiffs herein until reversed or set aside by direct attack. The distinction is well pointed out in 2 Wait's New York Practice (2d ed.), page 3415, where the author says: "If the court had jurisdiction of the subject matter of the controversy and of the parties thereto, its order, even if irregular, is binding until reversed or set aside by direct attack." He cites *Kamp* v. *Kamp,* 59 N. Y. 217, where Judge Allen says: "But the learned judge clearly recognizes the distinction between cases in which the court has jurisdiction and where it has not, reaffirming the rule that when jurisdiction exists, the decision of the court is conclusive, although erroneous, until reversed, while in the absence of jurisdiction it is a nullity." And at page 218: "Judgments of courts proceeding within their jurisdiction cannot be questioned collaterally or by other tribunals, except upon appeal." In *Hughes* v. *Cuming,* 165 N. Y. 91–94, Judge Vann writing in this case (which is analogous to the question here involved) says: "The most important question presented by this appeal is whether the Supreme Court had jurisdiction to make the order of removal. If that court had jurisdiction of the subject matter of the controversy and of the parties thereto, its order, even if irregular, is binding until reversed or set aside by direct attack." From the reasoning hereinabove the court concludes that, having jurisdiction of the subject matter involved herein, the judgment as entered herein against the plaintiffs, where the defendants were plaintiffs, in the replevin actions, were regular and conclusive against the respective plaintiffs herein. The court has examined the authorities cited by the plaintiffs herein, and from the examination thereof fails to see where they are applicable to the cases at bar. *Meurer* v. *Berlin,* 80 App. Div. 294, was an action upon a promissory note where the court did not obtain juris-

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diction. *Julian* v. *Woolsey*, 87 Hun, 326, was an action personal in its nature for the balance due plaintiff under an accounting where the court recognized the distinction in its opinion, and where it says: "There is force in the suggestion of plaintiff that a judgment which appears to be valid is presumptively so until successfully assailed, and there are provisions of the Code which prevent advantage being taken of irregularities in judgments after a certain period. The claim herein made, however, is not that the judgment is irregular, but that it is void because the court never obtained jurisdiction by service on the defendant." Both these decisions were upon motions made in the original action, and were not collateral attacks upon the judgments. The next question that arises is, have the defendants herein complied with the Personal Property Law of the State of New York, sections 65 and 66? The evidence in the case shows that the property was retained by the vendor for the period of time mentioned in the statute, and a notice of the sale was mailed to the respective plaintiffs herein fifteen days before such sale by a written notice setting forth when the sale was to be held within the county of New York in compliance with the necessary terms of sale. No question is raised as to the noncompliance with the Personal Property Law as above stated in the *Blumgarten* case herein, but the question of insufficient time is raised by the plaintiff in the *Kurzweil* case, claiming that the notice having been mailed to the plantiff herein on September seventeenth and not received until September eighteenth for the sale of the piano on October second, the time stated was limited to but fourteen days' instead of fifteen days' notice as required under the statute. In this plaintiff is in error as, in construing section 66 of the Personal Property Law, the date of mailing and the date of service must

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be considered as synonymous, to be excluded in reckoning time, because the plaintiff received the notice by mail on September eighteenth for the sale of the chattels on October second, and plaintiff had the full fifteen days' notice as required by said section under the statute. As the attorneys for the respective parties in both cases have consented in open court that the court may direct a verdict upon the facts and law involved herein, the court directs a verdict in favor of the respective defendants upon the merits.

Judgments for defendants.

MAX W. MAYER, Doing Business under the Firm Name and Style of M. & C. Mayer, Plaintiff, *v.* SOUTHERN PACIFIC COMPANY, Defendant.

(Municipal Court of the City of New York, Borough of Manhattan, Fifth District, May, 1916.)

Carriers — of merchandise — bill of lading — actions — Interstate Commerce Law.

Under the amendment of 1906 to the Interstate Commerce Law (Carmack amendment) a shipment of merchandise from New York to Texas is governed by the federal statute and regulations which supersede the state laws on the subject.

Where defendant had no notice of any arrangement between the consignor and the consignee except such as could be inferred from the bill of lading, the goods having been billed straight were properly delivered to the consignee mentioned in the bill of lading without the production thereof.

Where the goods were consigned to a symbol "M (M) C" in care of a bank for the alleged consignee the symbol in an inquiry as to who was consignee will be disregarded where it is admitted by both parties that it is nothing but a fictitious designation.

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Though a third person in whose care a package is addressed is clothed with the right to receive it, it does not follow that such delivery is the only good delivery relieving the carrier from liability.

The consignor in an action to recover the value of the goods having failed to guard himself against delivery before payment by using an order bill of lading or notifying the carrier that the goods should not be delivered except on payment, defendant was not bound to know the arrangement between the consignor and the consignee.

The symbol used in the present instance did not put the carrier on inquiry as to any arrangement between consignor and consignee as it would have had there been an order bill of lading.

The goods having been shipped under a straight bill of lading and no notification appearing thereon of any arrangement between consignor and consignee, delivery to the consignee relieves the carrier from liability.

ACTION to recover the value of certain merchandise.

House, Grossman & Vorhaus (Herman Joseph and Frederick Henry, of counsel), for plaintiff.

Esselstyn & Haughwout (J. Ard Haughwout and Everett J. Esselstyn, of counsel), for defendants.

SPIEGELBERG, J. The plaintiff seeks to recover the value of merchandise delivered by him to the defendant for shipment from New York city to Fort Worth, Tex. According to the bill of lading the goods were consigned to:

"M. [M] C c/o Western National Bank Ft. Worth for A. J. Cohen 601 May St. Tex."

The goods were delivered to Cohen at Fort Worth, Tex. The plaintiff now claims that this was a wrongful delivery, for which the defendant must be held responsible as the initial carrier under the amendment

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of 1906 to the Interstate Commerce Law, known as the Carmack amendment. 34 U. S. Stat. 584. This being an interstate transaction it is governed by the federal statutes and regulations which supersede the state laws on the subject. *Adams Express Co.* v. *Croninger,* 226 U. S. 491; *Fitch, Cornell & Co.* v. *Atchison, Topeka & Santa Fe R. R. Co.,* 170 App. Div. 222.

At common law the carrier who received goods billed to a named consignee was relieved from further liability by delivery to such consignee, unless the consignor stipulated otherwise in the bill of lading or the carrier had otherwise notice that the consignee was not the owner. This rule rests upon the presumption that the title to the goods becomes vested in the consignee upon delivery to the carrier. *Lawrence* v. *Minturn,* 58 U. S. 100; *Southern Express Co.* v. *Dixon,* 94 id. 549, *Sweet* v. *Barney,* 23 N. Y. 335; *Pennsylvania R. R. Co.* v. *Titus,* 216 id. 17.

Owing to many complaints from shippers concerning the provisions of the so-called uniform bill of lading then generally in use by the carriers, the interstate commerce commission instituted an investigation and inquiry on November 21, 1904. *Matter of Bills of Lading,* 14 I. C. C. Rep. 346. As the result of such investigation the commission, on June 27, 1908, recommended two distinct forms of bills of lading, one being the "straight" and the other the "order" form. After referring to the two forms, the commission says at page 348:

"They will differ only on the face side; the conditions printed on the back being the same in both cases. These differences will appear upon inspection and need not here be enumerated. The main point in this connection is that the 'order' bill will possess a certain degree of negotiability, while the 'straight' bill will be non-negotiable and is to be so stamped upon its face.

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Moreover, and this is a matter of consequence, the order bill of lading will be required to be surrendered upon or before the delivery of the property to the consignee."

Attached to the report the two forms are given in full.

The requisite of an order bill of lading is stated to be:

"In connection with the name of the party to whom the shipment is consigned the words 'Order of' shall prominently appear in print, thus: 'Consigned to order of.....'"

And the straight bill of lading must contain the words "not negotiable." P. 352. These two forms were adopted by the carriers. The bill of lading in this case was a straight bill of lading. It was filed with the interstate commerce commission and received its approval.

The goods in question were intended for Cohen, but it is claimed by the plaintiff that delivery was only to be made on payment of the purchase price to the Western National Bank. The defendant had no notice of any arrangements existing between the plaintiff and Cohen except such as can be inferred from the face of the bill of lading. The goods were delivered to Cohen without the production of the bill of lading, and under the form bill chosen by the plaintiff there was no obligation for its production as a prerequisite for delivery. The goods having been billed straight, they were properly delivered to Cohen, if he was the consignee mentioned in the bill of lading. *Bank of Batavia* v. *N. Y. L. E. & W. R. R. Co.*, 106 N. Y. 195, 201; *Pennsylvania R. R. Co.* v. *Titus*, 156 App. Div. 830, 835; revd. on another point, 216 N. Y. 17; *Ensign* v. *Illinois Central R. R. Co.*, 180 Ill. App. 382, 386; *Judson* v. *Minneapolis & St. Louis R. R. Co.*, 154 N. W. Rep. 506.

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The decision of this case therefore depends upon the question whether Cohen was the consignee designated in the bill of lading. It stands to reason, and it is admitted by both parties, that the symbol "M [M] C" is nothing but a fictitious designation. It does not represent anybody, and must be disregarded in the inquiry as to who is designated as consignee. If authority were needed in support of this proposition it may be found in *Furman* v. *Union Pacific R. R. Co.*, 106 N. Y. 579, where the goods were consigned to "Y." and in *Weisman* v. *Phila., Wilmington & Baltimore R. R. Co.*, 22 R. I. 128, where the consignee was designated as "S. W." Disregarding, therefore, the symbol in this case, the goods were consigned to "c/o Western National Bank for A. J. Cohen." It is stated in 2 Hutchinson on Carriers, section 676, that goods shipped to one person as consignee, in care of another, should be delivered to the consignee, and in case he cannot be found, then to the one in whose care they are shipped. The case cited in the text (*Schlesinger* v. *Railroad Co.*, 88 Ill. App. 273) was followed and quoted with approval in *Hoops* v. *Wells-Fargo & Co.*, 176 id. 620. It may be that the delivery to the Western National Bank would have relieved the defendant from liability. *Commonwealth* v. *People's Express Co.*, 201 Mass. 564, 572; *Russell* v. *Livingston*, 16 N. Y. 515, 518. But though a third person in whose care a package is addressed is clothed with the right to receive the goods, it does not follow that such delivery is the only good delivery relieving the carrier from liability. *United States Express Co.* v. *Hammer*, 21 Ind. App. 186. In this case no good reason existed for the delivery to the Western National Bank, as the address of Cohen was given, with street name and number. The following quotation from *Weisman* v. *Philadelphia, Wilmington & Baltimore R. R. Co., supro*, is

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very appropriate to this case: "The complaint of the plaintiff is not that the goods were not delivered to the proper person at the proper place, but rather that they were delivered prematurely; his intention being that they should not be delivered until the price had been paid."

In that case the goods were consigned to "S. W., 810 Baltimore street, Baltimore, Maryland." The letters represented the initials of the plaintiff. The goods were delivered to a person not named in the bill of lading, though living at the address given. It appearing that they were intended for that person, the court held that it was a good delivery. This is the situation here, with the difference that in this case the person to whom the goods were sold and for whom they were intended was specifically mentioned in the bill of lading. The plaintiff could have guarded himself against delivery before payment by using an order bill of lading or notifying the carrier that the goods should not be delivered except upon payment. He failed to do so, and, having failed to do so, the defendant is not bound to know the arrangements between the consignor and the consignee. *Nebraska Meal Mills* v. *St. Louis Southern R. Co.*, 64 Ark. 169; *Pennsylvania R. R. Co.* v. *Titus*, 216 N. Y. 17. In *U. S. Express Co.* v. *Hammer, supra*, the bill of lading read: "For R. C. Hammer, Indianapolis, Indiana, in care of American Express Co." The American Express Company having declined to accept the property in controversy, it was held that Hammer was the proper consignee and that he could maintain an action in replevin against the carrier upon the ground that as between the carrier and Hammer the latter was entitled to the possession of the goods. If in this case the goods had been billed "for A. J. Cohen, 601 May street, c/o Western National Bank," would there be any doubt as to the identity

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of the consignee? I cannot perceive how the mere transposition of the words makes the bank and not Cohen the consignee.

The learned counsel for the plaintiff maintains that the symbol "M [M] C," together with the designation "c/o Western National Bank," should have put the defendant upon its inquiry to ascertain that the Western National Bank had the original bill of lading with draft attached with instructions not to deliver the bill of lading until such time as the draft had been paid, and that under the circumstances it was the duty of the defendant to make delivery only upon surrender of the bill of lading. This argument loses sight of the difference between an "order" and a "straight" bill of lading. The duty which the plaintiff casts upon the defendant would have existed if the plaintiff had chosen an order bill of lading. He relies upon the case of *Furman* v. *Union Pacific R. R. Co.*, 106 N. Y. 579. In that case the goods, which were consigned to "Y——— order, notify Zucca Bros.," were delivered to Zucca Brothers without the production or surrender of the bill of lading. The court held that Zucca Brothers were not named as the consignees and that the delivery to them was improper. The court says at pages 587 and 588: "In this bill no one is named as consignee, and that makes it obvious that no delivery should be made to any one who does not produce it. The words 'Y——— order, notify Zucca Bros.,' in the order in which they are written, show that the goods are not to be delivered to the order of Zucca Brothers, because after the word 'order,' in relation to Zucca Brothers, is the word 'notify,' which notification is all the duty the defendant had to perform under the bill. The word 'order,' therefore, must relate to what preceded, and it must have meant that delivery was to be made to the order of the consignors, or else to the

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order of 'Y,' which, being altogether fictitious, does not mean to the order of Zucca Brothers unless they produce the bill of lading. Zucca Brothers not being the consignees, therefore, all the cases showing that *prima facie* the consignee is the owner, and a delivery to him protects the carrier, unless he has been notified to the contrary, do not apply here."

The learned counsel for the plaintiff seems to be of the opinion that the presence of the letter "Y" determined the decision in the *Furman* case and by analogy argues that "M [M] C" in this case should have put the defendant on its guard, but the reading of the opinion of the *Furman* case clearly shows that the decision was not based upon the ground that "Y" appeared as the fictitious consignee, but upon the direction that Zucca Brothers should be notified of the arrival and that the goods were consigned to order. The rule laid down in the *Furman* case anticipates the ruling since adopted by the interstate commerce commission above referred to in regard to the difference between a "straight" and "order" shipment. Citing the *Furman* case, the United States Supreme Court said in *North Pennsylvania R. R. Co.* v. *Commercial Bank,* 123 U. S. 727, 736, that it was therein held that placing in a bill of lading a direction to notify certain persons is a plain indication, in the absence of further directions, that they are not the consignees. The elements in the *Furman* case are entirely wanting here. The goods in question were, as a matter of fact, intended for Cohen; they were shipped under a straight bill of lading and no notification appeared thereon. I am of opinion that Cohen is the consignee named in the bill of lading and that the delivery to him relieves the defendant from liability.

Having arrived at this conclusion, it is unnecessary to determine the controversy between the parties

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whether or not the goods were delivered to Cohen upon the authority of the bank.

Complaint dismissed on the merits.

SAMUEL MITCHELL, Plaintiff, *v.* THE SECURITY BANK OF NEW YORK, Defendant.

(Municipal Court of the City of New York, Borough of Manhattan, Fifth District, May, 1916.)

Judgments — of Municipal Court of city of New York — Municipal Court Code, § 93 (2).

Under section 93 (2) of the Municipal Court Code a judgment of the Municipal Court of the city of New York for a sum of money may be amended so as to accord with the correct calculation of interest.

APPLICATION to amend judgment.

Hirschman & Drucker, for plaintiff.

I. Gainsburg, for defendant.

LAUER, J. Judgment was entered herein for a sum which was supposed to include the correct amount of interest. Proof of the amount of interest was given by the attorney. It now appears that the amount of interest as calculated was incorrect and this application is made to correct the judgment in accordance with the correct calculation of the interest.

It seems to me the power to make the correction is adequate. Under section 93, subdivision 2, Municipal Court Code, it is provided that: "At any stage of the cause the court must allow amendment of any * * * judgment, * * * if substantial justice will be promoted thereby; and as a condition thereof may impose such terms as may be just."

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The defendant objects to the granting of the amendment and cites in support of its position the case of *Vitale* v. *Gants,* 123 N. Y. Supp. 45. This case is authority for the proposition that no modification of a judgment respecting a matter of substance may be made. The opinion recognizes that to correct a clerical error, and I would place in a similar category a miscalculation of interest, an amendment may be allowed. The authority upon which the decision of *Vitale* v. *Gants* is based is that of *Heath* v. *New York B. L. B. Co.,* 146 N. Y. 263, which distinctly recognizes the power of a court of record to correct mistakes so long as no substantial rights of the parties are affected. In the present case I can see no substantial right of the defendant which will be impaired by the correction of the judgment to include the proper amount of interest.

In a recent decision of the Appellate Term of this Department in the case of *Duringshoff* v. *O. B. Coates & Co.,* 93 Misc. Rep. 485, the control of this court over its records and judgments is expressly recognized. In the opinion the court said that: "Since September 1st, 1915, the Municipal Court has been a court of record and * * * there appears no reason why * * * that court, in common with other courts of record, should not have and exercise over its records the power in that regard invoked by petition." In that case the power which the court was asked to exercise was to vacate a satisfaction of a judgment.

I conclude, therefore, substantial justice will be promoted by the amendment of the judgment sought. The application is accordingly granted.

Application granted.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. MAY WARD, Appellant.

(County Court, Niagara County, May, 1916.)

Criminal law — evidence insufficient to convict defendant of being common prostitute.

Where though police officers testify that the place where they arrested defendant, charged with being a common prostitute, had the reputation of being a disorderly house the evidentiary facts brought out on the trial are insufficient to prove either that she was such a character or that she had no lawful employment whereby to maintain herself, and there is not the slightest suggestion in the evidence that she made an indecent proposal or acted in a lewd or indecent manner, her conviction will be reversed and a new trial ordered.

APPEAL from a judgment of the Police Court of the city of Niagara Falls convicting the defendant of vagrancy in violation of section 887, Criminal Code, subdivision 4e.

Angelo F. Scalzo, for appellant.

J. William O'Brien, assistant district attorney, for respondent.

FISH, J. The information charges the defendant with being a common prostitute who has no lawful employment to maintain herself and then says "Vagrant, 887, Code, Sub. 4." Apparently the charge against the defendant was a violation of section 887, subdivision 4e, the applicable portion of which provides as follows: "The following persons are vagrants * * * 4. A person * * * (e) who is a common prostitute who has no lawful employment whereby to maintain herself."

Under this it was incumbent on the people to prove (1) that the defendant was a common prostitute; (2)

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that she had no legal employment whereby to maintain herself; and the question arises as to whether there was any evidence which would justify the judge in finding these two facts.

The only evidence on the part of the people was that of two police officers who testified that they went to 131 Eleventh street in the city of Niagara Falls about nine P. M., that there was a back door up stairs opening into the hallway of the second story of the place, that they looked through the keyhole of this door and saw a woman coming from a bedroom to a toilet next to this door carrying a basin of water, that there were a number of men in the room known as the dance hall which it appears was up stairs but just where with reference to this bedroom does not appear, that they then went to the front of the place, went into the barroom, asked the bartender to allow them to go up stairs, went up stairs finding about twenty men up there but no women, that they thereupon left returning about ten forty-five P. M., again went to the back door, looked through this keyhole, saw two men, two women and a large number of men, that one of them went around to the front door and the other entered by the back door and in the dance hall found the defendant there, "that she was not drinking or doing anything but standing there," and that she was dressed in a white shirt waist, black skirt and had slippers on, that one of them arrested her, she put on her hat and shoes and was taken to the station. Each officer also testified that the place in question had the reputation of being a disorderly house.

These evidentiary facts are insufficient to prove either of the two ultimate facts which it was necessary for the people to establish before the defendant could be convicted. A defendant is presumed to be innocent and before conviction his guilt must be estab-

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lished beyond a reasonable doubt. So far as the evidence shows this defendant may have been in this place on an innocent mission. There is not the slightest suggestion that she made an indecent proposal or that she acted in a lewd or indecent manner. It is true she was found in a house which the police judge might have found was a disorderly house, assuming that evidence as to the reputation of the house was competent; but a disorderly house is not necessarily a house of prostitution and, even if it were, there is no evidence that she knew of the character of the house. *People* v. *Meyer,* 157 N. Y. Supp. 997. Furthermore, even if the defendant was a common prostitute, before she could be convicted it was necessary to go further and show that she had no lawful employment whereby to maintain herself; and there is not the slightest evidence to show that she had no such employment. A common prostitute is not necessarily a person who has no lawful means whereby to maintain herself. *People* v. *Forbes,* 4 Park. Cr. Rep. 611. In *People* v. *Florence Bell,* not reported, I had occasion to examine the subject and came to the conclusion that a common prostitute was a female who commonly engaged in the practice of indiscriminate sexual intercourse with men and that it was doubtful whether the element of gain was essential to constitute one a prostitute. Such a person might have a lawful employment during the day and still be engaged in prostitution at night.

Inasmuch as the district attorney claims that this was a bad place and the defendant undoubtedly guilty, I shall order a new trial to the end that the people may establish the defendant's guilt by competent evidence, if they can.

Judgment reversed and new trial ordered in County Court.

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WILLIAM M. DAVIDGE, Doing Business as HUDSON CARBON COMPANY, Respondent, *v.* WILLIAM Y. VELIE and FRED VELIE, Copartners, Doing Business under the Firm Name and Style of VELIE BROTHERS, Appellants.

(County Court, Ulster County, May, 1916.)

Contracts — what necessary to make complete contract — actions — evidence.

To make a written instrument, which is nothing more than an offer by defendants to purchase fertilizer, fixing price, quality, quantity, time and place of delivery, a complete contract, acceptance by act, or promise of plaintiff is necessary, and in an action to recover the purchase price of goods delivered thereunder defendants are entitled to show that it was agreed that an order for goods to be delivered March first might be canceled by defendants any time before that date, and the exclusion of such testimony on the ground that the writing contained a complete contract and that parol evidence was inadmissible to vary its terms, was error.

APPEAL from Justice's Court from a judgment of forty-five dollars and ninety-three cents against the defendant.

Alexander Johnston (V. B. Van Wagonen, of counsel), for appellant.

A. D. & A. W. Lent, for respondent.

JENKINS, J. On October 6, 1914, a paper, of which the following is a copy, was signed by one of the defendants and delivered to the plaintiff:

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"Hudson Carbon Co.,
"Order ....., Date ....., 191..
Oct. 6, 1914,
"Ship to Velie Bros.
"At P. O. Marlboro, N. Y.
"How ship, Cedarcliff, N. Y. When, Mch. 1st.
"Terms, Net cash fob, Cedarcliff, N. Y.
"Salesman ..... Buyer .....
If needed earlier will advise.
"20 bags, 1 ton
Davidge's Special Phosphorus,
$40.00
"Velie Bros.
"Less freight."

On February 12, 1915, the plaintiff delivered this fertilizer to the Delaware and Hudson Railroad Company at Ballston Spa, for shipment, and in due course it arrived at Cedarcliff, before February twenty-second, when the defendants wrote the plaintiff that they had just received word of the shipment of February twelfth, of one ton Davidge's Special Phosphorus and that they had on February eighteenth written asking them to cancel the order for March first. That they gave this order with the understanding that they could so do, and that they would not take it from the freight house.

The plaintiff sued to recover the purchase price. The defendants claimed nonperformance by delivery before the time fixed in the order; and that the writing above set forth did not contain the entire agreement. Upon the trial the defendants' offer of proof that it was agreed that the order for March delivery could be cancelled by defendants any time before March 1st was rejected upon the ground that the writing contained a complete contract and parol evidence was not

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admissible to modify its terms. I think this was error. The contract was not complete on its face. There was no acceptance of the order in the writing, nothing to bind the plaintiff so as to make a complete executory contract. It was an offer, and, to make a complete contract, an acceptance by act or promise by the plaintiff was necessary. The writing might have been shown to be part only of an entire verbal contract. If this instrument can be said to contain a contract, this case falls in the second class of exceptions set forth in the opinion in *Thomas* v. *Scutt*, 127 N. Y. 133, to the rule that a complete written contract cannot be modified or contradicted by parol evidence. Judge Vann says: "The second class embraces those cases which recognize the written instrument as existing and valid, but regard it as incomplete either obviously, or at least possibly, and admit parol evidence, not to contradict or vary, but to complete the entire agreement of which the writing was only a part. * * * Two things, however, are essential to bring a case within this class: I. The writing must not appear upon inspection to be a complete contract, embracing all the particulars necessary to make a perfect agreement and designed to express the whole arrangement between the parties, for in such a case it is conclusively presumed to embrace the entire contract.

"2. The parol contract must be consistent with and not contradictory to the written instrument."

The written instrument here is nothing more than an offer by the defendants to purchase fertilizer, fixing price, quality, quantity, time and place of delivery. No acceptance binding the plaintiff can be found within the four corners of the paper. It may be that soliciting the order and manual acceptance of the paper would warrant the inference of its acceptance, but that must be shown by evidence outside the paper. I think

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the defendants should have been allowed their proof showing an entire executory contract of an order for goods to be delivered March first, with a right to cancel before the date of delivery.

Regarding the instrument as an offer, where is the acceptance necessary to make a complete contract? Was the shipment of February twelfth such an acceptance? I think not, because the act did not square with the offer. The offer was for a shipment on March first, and that is not complied with by a shipment February twelfth. *Corrigan* v. *Sheffield,* 10 Hun, 227.

Again, if the instrument was only an offer, the defendants had a right to withdraw it before acceptance by the plaintiff. This they did by notifying the plaintiff a reasonable time before March first.

For these reasons the judgment is reversed, with costs.

Judgment reversed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* JOHN KADEL, Appellant.

(County Court, Bronx County, May, 1916.)

Witness — hostility of, may be shown — when exclusion of testimony as to ill-feeling of witness toward defendant calls for reversal of judgment of conviction.

It is well settled that testimony to prove the existence of hostile relations between a witness and the party against whom he is called is competent and material.

Where on a charge of disorderly conduct involving abusive language to and an assault upon a woman made against defendant, a member of the bar in good standing, the complainant is supported in her version of the alleged disorderly conduct by her sister and defendant's explanation of what occurred was corroborated by his wife he is entitled to show by cross-examination

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that the testimony of complainant and of her sister was based on malice and that their conduct towards him was induced by feelings of resentment arising from the fact that he had brought certain actions at law against their brother with whom they resided, in one of which the complainant was surety on an undertaking given on appeal, and the exclusion of such testimony is error calling for the reversal of judgment of conviction rendered against defendant.

APPEAL from a judgment of conviction rendered in a City Magistrates' Court.

J. Philip Van Kirk (Ely Newman, of counsel), for appellant.

Francis Martin, district attorney (Richard H. Mitchell, of counsel), for people.

GIBBS, J. This is an appeal from a judgment of conviction rendered in the City Magistrates' Court. The appellant was convicted on the 29th day of November, 1915, of the offense of disorderly conduct before the said City Magistrates' Court, eighth district, and judgment suspended. The defendant's good character was conceded by the complainant, through her counsel. The defendant is a member of the bar in good standing, and holds a public position of trust and confidence. Under the circumstances, a conviction even for such a minor offense as disorderly conduct where it involves abusive language toward and an assault upon a woman is a serious blemish upon his personal and professional reputation. The complaining witness, Elizabeth Page, was supported in her version of the alleged disorderly conduct of the defendant, by her sister, Ethel Page, and the defendant's explanation as to what occurred was corroborated by his wife, Amanda Kadel. It is evident, therefore, that the questions of

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fact as to the disorderly conduct were close, and that any evidence which would have a tendency to prove feelings of hostility on the part of the witnesses towards each other, or which would show malice or ill feeling, was important and highly illuminative of the transaction.

The complaining witness testified in substance that the defendant, while out walking with his wife, on Sunday afternoon, the 10th day of October, 1915, entered a plot of ground in The Bronx, under her control, and that she ordered him off, and that he refused to go; that she then attempted to lead him out, taking him by the arm for that purpose. That after some words on both sides, the defendant struck her a number of blows on the face and head, and used violent and abusive language while doing so. The defendant denied that he was disorderly or that he assaulted the complainant, asserting that in point of fact he was insulted and beaten by the complainant and her sister, Ethel, heretofore referred to. The defendant also testified before the Magistrates' Court that the occasion of his presence on the lot in question (which is located in a sparsely settled section of The Bronx) was to pick some flowers for his wife. He attempted to show by his cross-examination that the testimony of the complaining witness and her sister was based on malice and that their conduct towards him was induced by feelings of resentment arising from the fact that he had brought certain actions at law against their brother, Raymond Page, with whom they reside, in one of which Elizabeth, the complaining witness, was surety on a bond given on appeal in the Appellate Division of this department.

The magistrate who presided appears to have taken the position that the witnesses were not subject to cross-examination along these lines. To use his words:

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"I think that is too remote" and sustained various objections to this line of cross-examination. In this respect I think the learned magistrate committed serious error affecting the substantial rights of the defendant. In my judgment, the defendant should have been given the widest possible latitude on cross-examination to show feelings of hostility, prejudice, bias or malice. Under the circumstances surrounding the complaint, the defendant had an unquestionable right to show by his cross-examination the existence of any relevant facts which would show hostility on the part of the prosecution's witnesses based on their blood relationship with one whom the defendant had engaged in serious and bitter litigation. The competency and materiality of evidence to prove the existence of hostile relations between a witness and the party against whom he is called is well settled in our law and supported by numerous decisions in our state as well as other jurisdictions. A leading case bearing upon this proposition is the case of *People* v. *Brooks*, 131 N. Y. 321, part of the headnote reading as follows: "The hostility of a witness towards a party against whom he is called may be proved by any competent evidence, either by cross-examination of the witness or by the testimony of other witnesses." There are a number of other circumstances developed in the record before the magistrate which lead me to the conclusion that the defendant did not receive the legal trial to which he was entitled, particularly so much of the minutes which show the colloquy between the court and the various parties including the defendant, and which resulted in the defendant making an apology to the complaining witness, upon the court's statement, before pronouncing judgment "* * * an ample apology would cover the whole thing." It appears, however, that

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after the defendant apologized through his counsel, the counsel stating "The defendant apologizes publicly for the fact that there was any excitement or trouble that day and is sincerely sorry that anything should have happened," the court found him guilty in the words "I find the defendant guilty and suspend sentence."

On this point, it is unnecessary to make further comment, since I regard the errors in the exclusion of the questions on cross-examination, heretofore referred to, as vital and substantially affecting the rights of the defendant.

The judgment of conviction is reversed and a new trial ordered in this court pursuant to section 768 of the Code of Criminal Procedure.

Judgment reversed and new trial ordered.

LEO LOWY, Respondent, *v.* HARDMAN, PECK & Co., Appellant.

(Supreme Court, Appellate Term, June, 1916.)

Sales — conditional — contracts — pleading — Personal Property Law, §§ 65, 66.

Where a piano, sold under a contract of conditional sale, was taken by the vendor in replevin and sold, and upon the face of the complaint in an action by the vendee to recover the amount paid on the contract it appears that no judgment was entered in the replevin action, a denial in the answer of an allegation in such complaint that the piano was not sold in compliance with the provisions of sections 65 and 66 of the Personal Property Law raises an issue of fact, and an order granting plaintiff's motion for judgment on the pleadings will be reversed.

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APPEAL by defendant from order of the City Court of the city of New York, granting plaintiff's motion for judgment on the pleadings.

Francis C. Brown, (Nathan Ottinger and Max J. Bernheim, of counsel) for appellant.

Eugene I. Yuells, for respondent.

GUY, J.: The complaint alleges the purchase of a piano by plaintiff from the defendant under a contract of conditional sale on or about April 12, 1913; that after receiving payment of $100 on account of the purchase price the vendor, on November 5, 1915, replevied the piano; that the sheriff delivered the piano to this defendant (the plaintiff in the replevin action) and within sixty days thereafter this defendant sold the piano; that no judgment was entered in that action; that the sale did not comply with the provisions of sections 65 and 66 of the Personal Property Law requiring that articles sold under contracts of conditional sale, if the same are retaken by the vendor, be retained for thirty days after the retaking to enable the vendee to comply with the terms of the contract that unless the articles are sold within thirty days after the expiration of such period of thirty days the vendee may recover the amount paid by him under the contract, and that fifteen days before the sale notice shall be given to the vendee in the form and manner prescribed by the statute. Judgment is demanded for $100, the amount paid on the contract.

The only material allegation of the complaint denied by the answer is the allegation that the defendant in selling the property did not comply with the requirements of the laws of the state of New York.

The apparent theory of the complaint is that

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because of plaintiff's default in complying with the terms of the contract of conditional sale there was a retaking of the piano by the defendant through the delivery of the chattel to it by the sheriff, that the property was sold within sixty days after the retaking, and that the defendant by violation of the provisions of the Personal Property Law was required to pay the plaintiff the amount paid by him on account of the purchase price of the piano. If this construction be correct, the denial of the allegation of the complaint that the defendant failed to comply with the laws of the state of New York raised an issue, and the plaintiff was not entitled to judgment on the pleadings.

The learned justice below, however, held that the theory of the complaint is that the chattel was not retaken by the vendor within the meaning of section 65 of the Personal Property Law, and could not be so retaken until the entry of judgment in the replevin action; that meanwhile the property was *in custodia legis;* that "there was no retaking by the vendor because of lack of final judgment. Failure to perform the obligation imposed by the Personal Property Law appears from the sale of the chattel during its custody by the law and before a retaking was had pursuant to law, and the penalty follows."

If the conclusion that there was no retaking of the chattel be correct, it is difficult to understand how a statute which gives a remedy where the chattel has been retaken by the vendor can have any application. In *Spitaleri* v. *Brown,* 163 App. Div. 644, cited by the justice below in his opinion, replevin had also been instituted by the vendor, the sheriff had delivered the chattel to him, and during the pendency of the action the vendor, after giving the prescribed statutory notice, caused the property to be sold within sixty

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days of the taking by the sheriff, and purchased the property at the sale. After the sale judgment was entered in the replevin suit in favor of the vendor, and the Appellate Division of the second department held in the subsequent action brought by the conditional vendee against the vendor that under the provisions of the Personal Property Law the plaintiff was entitled to receive the payments made by him on account of the chattel, the court saying (p. 648): "The defendant, having failed to perform the obligation imposed upon him by the provisions of the Personal Property Law (*supra*), must suffer the liability it prescribes for such failure."

It appears upon the face of the complaint in the case at hand, however, that no judgment has been entered in the replevin action brought against this plaintiff, so that even under the authority of the *Spitaleri* decision there has been no retaking of the piano by the vendor; and while logically the situation here is similar to if not identical with that presented in the case cited, even though no judgment has been entered here, we think that that case should not control the disposition of this appeal. In *Sigal* v. *Hatch Co.*, 61 Misc. Rep. 332, cited as an authority for the decision in the *Spitaleri* case, the sole question to be determined, as appears from the opinion of this court, was whether the taking of the property by the marshal in replevin at the suit of the defendant in that case was a taking by the vendor within the meaning of the statute; and in *Crump* v. *Wissner*, 163 App. Div. 47, and *Quattrone* v. *Simon*, 85 Misc. Rep. 357, it was pointed out that where a conditional vendor has recourse to section 139 of the Municipal Court Act for the purpose of foreclosing his lien the vendee cannot resort to the remedy given him by section 65 of the Personal Property Law.

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If the receipt of the piano by the conditional vendor from the sheriff after that officer took possession of it under the writ of replevin constituted a retaking of the property by the vendor within the meaning of the statute, defendant's denial of the allegation of the complaint that the vendor failed to comply with the provisions of the Personal Property Law raised an issue of fact which could be disposed of only after trial. If, however, there was no retaking by the vendor the plaintiff was not entitled to the benefit of the statute, and the complaint, which was framed for the purpose of recovering the statutory relief, failed to state facts sufficient to constitute a cause of action. In either aspect plaintiff's motion for judgment should have been denied.

Order reversed, with ten dollars costs and disbursements, and motion denied with ten dollars costs.

BIJUR and PHILBIN, J. J., concur.

Order reversed, with ten dollars costs.

HERMAN WOLFERT, Appellant, *v.* THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND, Respondent.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Default — when entitled to have default opened without terms — calendar — trial — actions.

Nine separate actions to recover on policies of fire insurance appeared on the calendar of Part I of the trial court, numbered in consecutive order. The trial of the first cause being unfinished on the last day of the term all of the cases with the assent of plaintiff's counsel were adjourned to Part II.

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Held, that in the absence of due service of notice of trial defendant was not entitled to take plaintiff's default in appearance or refusal to proceed with the other actions after the conclusion of the trial of the first case and that plaintiff was entitled to have his default opened without terms.

Even had the default been properly granted, a requirement that plaintiff should stipulate to try the other actions as one deprived him of a substantial right and could not be properly imposed as part of the terms for opening the default.

APPEAL by plaintiff from so much of an order of the City Court of the City of New York made and entered April 26, 1916, as imposes conditions upon the opening of his default.

Louis B. Brodsky, for Appellant.

Cardozo & Nathan, (Michael H. Cardozo, Jr., of counsel) for respondent.

GUY, J.: The plaintiff brought nine separate actions in the court below on policies issued by nine insurance corporations, including the defendant, to recover for losses sustained by fire to his stock, machinery and fixtures.

After several adjournments the cases appeared on the calendar of Part I on March 30, 1916, and were numbered upon that calendar from 10637 to 10645 inclusive. On that date in Part I the trial of the first of plaintiff's cases, being the one against the Glens Falls Insurance Company, was begun, and as it was unfinished on Friday, March 31st, the last day of the term, the trial was adjourned to Monday, April 3, 1916, at Trial Term, Part II, and resulted in a verdict for the plaintiff for the full amount claimed with interest. On the following morning, April 4th, the remaining eight cases, of which this case was the first, were

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called for trial by the same justice in Part II, and the plaintiff's counsel stated that he was not ready to proceed with the trial owing to the absence of several material and necessary witnesses, that he and his client were tired and fatigued as a result of the trial in the Glens Falls case, that the plaintiff was in no physical condition to undergo the strain of the trial at that time, and he also urged that the cases were not properly before the justice on the calendar of Part II. No notice of trial had been served by defendant upon plaintiff in any of these actions. The presiding judge denied the motion for an adjournment and dismissed the eight cases upon the ground, as stated in an order dated April 6, 1916, of plaintiff's failure to prosecute the several actions.

Plaintiff thereupon moved to open the default, and the relief asked for was granted upon condition that the plaintiff pay a trial fee in each case and that he stipulate to try the eight actions as one, separate verdicts to be rendered against each defendant.

The trial justice, being the same justice who made the order appealed from, has found as a fact that the plaintiff's counsel assented to the transfer of all of the cases to Part II, and that they were regularly on that calendar when they were called for trial. Such assent, however, did not place defendant, in the absence of due service of a notice of trial, in a position where it was entitled to take the default of the plaintiff upon failure of plaintiff to appear or upon plaintiff's refusal to proceed with the trial. The granting of the motion for judgment based upon plaintiff's default was therefore erroneous, and plaintiff was entitled to an opening of said default without terms. Even had the default been properly granted the requirement that plaintiff should stipulate to try the eight actions together as one deprived plaintiff of a substantial

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right and could not be properly imposed as part of the terms for opening the default.

The order appealed from must, therefore, be reversed with ten dollars costs and disbursements and the motion to open the default granted, without costs.

BIJUR, J., concurs; PHILBIN, J., not sitting.

Order reversed with ten dollars costs and disbursements and motion granted, without costs.

HERBERT D. HOTALING, Respondent, *v.* THE CANTON ART METAL COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Accord and satisfaction — inquiry as to merits of — alleged evidence — contracts — when judgment reversed and new trial ordered.

Bar — what constitutes — agreement as to new promise — consideration.

The court will not inquire into the merits of a dispute as to an alleged accord and satisfaction; it is sufficient that there was any plausible ground for a *bona fide* claim and that it was made in good faith, and whether the dispute arose over a question of fact or of law is immaterial.

Where the evidence in an action to recover a commission to which plaintiff's assignor claimed to be entitled under a written contract upon all contracts taken in defendant's name by said assignor justifies the conclusion that there was an honest dispute between them with respect to the obligation of defendant to pay commissions on a certain job, the direction of a verdict in favor of plaintiff after defendant's counsel had asked to go to the jury on the question whether the evidence established an accord and satisfaction between the parties was error, and the judgment entered on the verdict as directed will be reversed and a new trial granted.

Where parties agree that a new promise shall be a satisfaction of a prior debt or duty the new agreement is based on a good consideration and if accepted in satisfaction constitutes a bar to an action on the original debt.

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APPEAL by defendant from judgment of the City Court of the city of New York, entered upon verdict directed for the plaintiff.

Herman Lubetkin (I. Maurice Wormser, of counsel and Samuel Brand, of counsel), for appellant.

William H. Chorosh, (Michael Schaap and Edward Hymes, of counsel), for respondent.

GUY, J.: In 1910 and 1911 plaintiff's assignor, Arthur S. Miller, was the sole selling agent in the city of New York for the defendant under a written agreement which entitled him to certain commissions upon the acceptance of all contracts taken in defendant's name by Miller. On December 23, 1910, the agent wrote defendant enclosing plans and specifications for metal furniture to be placed in the Hall of Records, bids for which were to be made December thirtieth. On the date last named the defendant in a letter replying to the agent's communication of December twenty-third stated that the day before the receipt of that letter by defendant it had forwarded to one Andrews, from whom the defendant had obtained the data for the bid, a figure for the work, although defendant had held up the matter in the expectation of receiving drawings from Miller.

Defendant subsequently was awarded the contract on its bid, and plaintiff's assignor claimed to be entitled to commissions amounting to $2,962.70 on the work; and it is alleged in the complaint that no part of this sum has been paid, except $1,000 allowed by the defendant to its agent on October 7, 1812.

From the correspondence which followed between the defendant and its agent it appears that the defend-

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ant, while claiming that it would have been impossible to prepare and submit a bid on the work in question in the short time between the receipt of the plans and specifications from Miller on December thirtieth, promised to pay him a small commission on the job, disputing, however, any liability to pay commission under the contract of agency.

In 1912 plaintiff's assignor was secretary and treasurer of Bankers Building Bureau, a corporation in which he was a large stockholder, and on behalf of that corporation he desired to place orders with the defendant. In September of that year defendant's witness Cook, an employee of the Bankers Building Bureau, was sent by Miller to Canton, O., defendant's place of business, in reference to the contracts of his employer. Cook testified that he discussed with the defendant's officers Miller's claims for commissions on the Hall of Records job; that they did not want to allow any commissions, but finally agreed, and he so reported to Miller, to allow $1,000 commissions in full settlement of Miller's claims, that sum to be applied on the account of the Bankers Building Bureau with the defendant, with the understanding that the balance of the account was to be paid in full at once; that Miller said to the witness, on his return to New York, that the arrangement was very satisfactory, and complimented him on getting the $1,000. The same witness further testified that he saw the letter to Miller, defendant's exhibit H (which, according to the record bears no date, but is referred to as dated September third and December third), in Miller's possession, and that he read it with Miller. This letter is in part as follows:

"When Mr. Cook was here Saturday (as he has no doubt explained to you) we came to an agreement with reference to back commission on the Hall of Records

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job, and he placed the following orders with us, with the understanding that this commission is to be deducted in making payment for same (specifying certain orders amounting to $6,495.00). * * * We agreed to allow you $1,000.00 commission on the Hall of Records job, and we made some slight concessions also on some of the work placed by Mr. Cook. It is our understanding with Mr. Cook that this $1,000 will be deducted in making payment for these jobs, and that the accounts of A. S. Miller and the Bankers Building Bureau will be paid immediately in full. * * *

"We are very glad that this matter has been adjusted amicably; and while we have explained to you several times, also to Mr. Cook, that we hardly thought you were entitled to commission on this job, considering the circumstances surrounding this particular case, still we are willing to make this concession in order to get this cleaned up."

Miller denied that he ever saw this letter; but on December twelfth he wrote defendant: "Answering your favor of September 9, 1912. Your arrangement with our Mr. Cook is fully satisfactory to me. Will send you greater part of your acct. early next week."

At the close of the case defendant's counsel asked to go to the jury on the question whether there was an accord and satisfaction between the parties, but the trial judge directed a verdict for the plaintiff.

The evidence justified the conclusion that there was an honest, real dispute between defendant and its agent with respect to the obligation of the defendant to pay commissions on the Hall of Records job. The court will not inquire into the merits of the dispute; it is sufficient if there was any plausible ground for a *bona fide* claim, and it was made in good faith, and it is immaterial whether the dispute arose over a ques-

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tion of fact or of law. *Jackson* v. *Volkening,* 81 App. Div. 36; affd., 178 N. Y. 562.

Defendant's evidence would have authorized a finding that by the allowance of $1,000 on defendant's account against Miller and the Bankers Building Bureau a satisfactory adjustment between the defendant and Miller was reached. That the Bankers Building Bureau did not fulfill the condition upon which the allowance was made by making prompt payment of all of the balance due to the defendant is not material, for its default is not to be charged against the defendant, and as far as the record shows the defendant did not retract its promise to allow the $1,000. Moreover, as between the two parties, the defendant and the plaintiff's assignor, after the dispute was adjusted by the allowance nothing else remained to be done; the accord was as to them an executed agreement; and the allowance of the $1,000 is expressly alleged in the complaint in reduction of the plaintiff's claim, indicating that as far as the plaintiff's assignor is concerned the accord, if it was in fact made as claimed by the defendant, was regarded by Miller as having been executed. As Andrews, J., says in *Kromer* v. *Heim,* 75 N. Y. 576–577: "The rule that a promise to do another thing is not a satisfaction, is subject to the qualification that where the parties agree that the new promise shall itself be a satisfaction of the prior debt or duty, and the new agreement is based upon a good consideration, and is accepted in satisfaction, then it operates as such, and bars the action." If defendant's testimony that a bid could not have been put in by the defendant on the Hall of Records job in the short period which elapsed between the time when it received the plans from Miller and the opening of the bids be true, Miller's claim for commission on that job was,

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to say the least, of doubtful validity, and there was ample consideration for the compromise.

It follows that the direction of a verdict for plaintiff was error, and the judgment and order must be reversed and a new trial ordered, with costs to the appellant to abide the event.

BIJUR and PHILBIN, J. J., concur.

Judgment and order reversed and new trial ordered with costs to appellant to abide event.

GUSTAVE WEISER, Appellant, *v.* MARMALAX MANUFACTURING CO., INC., Respondent.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Corporations — assignment of account for goods sold and delivered — evidence — Stock Corporation Law, § 66.

In the absence of proof that a corporation had refused to pay any of its obligations or that it was insolvent or that its insolvency was imminent, an assignment by it of an account for goods sold and delivered to one of its officers and stockholders does not violate section 66 of the Stock Corporation Law.

APPEAL by plaintiff from judgment of the City Court of the city of New York dismissing complaint.

Max Winder (Meyer Levy, of counsel), for appellant.

Reuben Doreman, for respondent.

GUY, J.: The complaint alleges the sale and delivery of certain goods by A. Kupferschmid, Inc., to defendant, and that the amount was assigned by the corpora-

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tion to the plaintiff for a valuable consideration before the beginning of the action.

The answer is a general denial.

The plaintiff's proof, aided by concessions of defendant, warrants a finding that plaintiff's assignor had a valid claim against defendant for a balance of account; and plaintiff put in evidence a written assignment of the claim executed under the seal of the corporation by its president, and duly proved before a notary public. Under the contract between plaintiff's assignor and the defendant the latter had a right to return defective goods, and it seems that some goods were returned; but the account, which is annexed to the assignment, gives defendant credit for "cash payments and credits," and it does not appear that defendant was not credited with any returns that were made.

The learned trial judge against the objection and exception of plaintiff allowed defendant to introduce testimony for the purpose of showing that the transfer by the corporation to the plaintiff, one of its officers and stockholders, for an antecedent debt, came within section 66 of the Stock Corporation Law, declaring such a transfer under the circumstances stated in that statute to be void; and at the close of plaintiff's case, apparently on the ground that the transfer was in violation of the statute, he dismissed the complaint. The dismissal was error requiring a reversal of the judgment.

The provisions of section 66 of the Stock Corporation Law in so far as this controversy is concerned are applicable only to a corporation "which shall have refused to pay any of its notes or other obligations, when due," or, considered from the standpoint of a preference to one not an officer or stockholder, to an insolvent corporation or one whose insolvency is imminent; and the record contains no evidence that plain-

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tiff's assignor had refused to pay any of its obligations, nor does it appear that the corporation was insolvent or its insolvency imminent. It follows that a finding by the court that the statute was violated by the assignment was unwarranted.

The judgment must be reversed and a new trial ordered, with costs to the appellant to abide the event.

BIJUR and PHILBIN, J. J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

ALEXANDER NECHAMKIN, Respondent, *v.* JAMES H. KENNEDY, Impleaded with others, Appellant.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Evidence — when inadmissible — automobiles — damages.

Where plaintiff's automobile was damaged in a collision, and in his bill of particulars the only damages stated were to his car, testimony as to the cost of hiring another and a chauffeur, while his own was being repaired, is inadmissible.

APPEAL by defendant James Kennedy, from judgment of the City Court of the city of New York entered on verdict in favor of plaintiff, and from order denying motion for a new trial.

Grover C. Sniffen (William Bondy, of counsel), for appellant.

William Rabinowich, (Moses Feltenstein and Abraham Rosenstein, of counsel) for respondent.

GUY, J. On or about June 6, 1913, plaintiff's automobile was damaged by the pole of a two-horse truck,

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which it was claimed belonged to the defendant, James Kennedy, colliding with the automobile, and the defendant, James Kennedy, appeals from a recovery against him in favor of plaintiff.

On the conflicting evidence the jury was authorized to find that the truck belonged to the appellant and that the driver was employed by the appellant and acting within the scope of his employment at the time of the accident.

Against the objection of the appellant the trial court allowed plaintiff to introduce evidence of the cost to the plaintiff to hire not only an automobile but also a chauffeur for the time during which it was claimed plaintiff's automobile was being repaired. On no theory could the amount paid by plaintiff for a chauffeur to drive a machine hired by him be an element of damage in this case. Further, under the order made in this action requiring plaintiff to furnish a bill of particulars he was directed to state in detail the damages claimed, and in his bill the only damages stated were damages to the automobile; and it was accordingly error to admit evidence of the cost of hiring an automobile.

The judgment and order should be reversed and a new trial ordered, with costs to the appellant to abide the event, unless the respondent will stipulate within ten days after service of a copy of the order entered hereon in the City Court with notice of entry thereof to reduce the judgment to the sum of $351.88, in which event the judgment as so reduced is affirmed, without costs of the appeal to either party.

BIJUR and PHILBIN, JJ., concur.

Judgment reduced and as so reduced affirmed, without costs of appeal.

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NICHOLAS CHRISTATOS, Respondent, v. NEW ENGLAND CASUALTY COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Insurance (accident) — conditions of policy of — compliance with — notice of acident.

A condition of a policy of accident insurance requiring the insured to give immediate notice to the insurer of any accident is to be interpreted as meaning that the insured shall give such notice after he has been apprised of the accident, or should have been had he exercised reasonable diligence.

Where the insured is a storekeeper it is his duty to so regulate his business that he may be apprised with reasonable certainty of any accident that may occur in its conduct.

If in such case, despite the exercise of reasonable care, the insured fails to acquire information as to an accident until sometime thereafter, but on its acquisition promptly notifies the insurer, he complies with the condition of the policy as to giving immediate notice.

APPEAL by defendant from judgment of the City Court of the city of New York, entered on verdict in favor of plaintiff.

James I. Cuff, for appellant.

Albert I. Sire (Bennett E. Siegelstein and William L. Stone, of counsel), for respondent.

GUY, J. Plaintiff has recovered a judgment against defendant, insurer on a policy of accident insurance. It appears that on or about July 5, 1913, one O'Brien was injured accidentally in plaintiff's store; that one year afterwards, in July, 1914, plaintiff, having had no notice of the accident, as he claims, was served

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with a summons in an action brought against him by O'Brien to recover damages for the injuries; that plaintiff thereupon notified the defendant of the suit, but that defendant's attorney claimed that because of the failure of the insured to give the insurer immediate notice it was not liable on the policy; that plaintiff accordingly retained counsel for the trial of the accident case, in which judgment was recovered for $150; and this action is on the policy to recover for the amount paid in satisfaction of that judgment and also for reasonable counsel fees. The defense is that plaintiff failed to perform the condition of the policy requiring him to give immediate notice of the accident to the defendant, and in the event of a claim being made on account of the accident to give like notice of such claim. The condition of the policy is to be interpreted as meaning that the insured shall give immediate notice after the insured has become apprised of the accident, or should have become so apprised had he exercised reasonable diligence. There is, therefore, cast upon him the duty of so regulating his business that he may be apprised with reasonable certainty of any accident that may occur in its conduct. If, despite the exercise of reasonable care, the insured fails to acquire the information till after a lapse of time, but on its acquisition gives prompt notice to the insurance company, he complies with the obligation of the policy. *Woolverton* v. *Fidelity & Casualty Co.*, 190 N. Y. 41, 47, 48.

O'Brien, the injured man, identified plaintiff's manager, Ezechel, in court as having been present at the time of the accident and having been present when O'Brien was picked up by two other men who were in the store at the time, and testified that he remained in the store for five minutes, then limped out of the store,

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accompanied by one of plaintiff's clerks, and that plaintiff's manager, Ezechel, came over to the place where plaintiff fell. Ezechel, called as a witness by plaintiff, denied absolutely having any knowledge as to the happening of the accident; but, when cross examined as to testimony given by him on a former trial in which O'Brien was plaintiff, admitted testifying that he remembered seeing plaintiff leave the store with somebody from the store, and that when that person came back he asked for what reason he left the store with O'Brien, and that he replied that the boy scratched himself; and when on said former trial he was asked the question: "Q. Then you did know something about this thing having happened?", he answered: "Surely." In view of these admissions as to what he testified to on a former trial, Ezechel's denial of knowledge of the happening of the accident was entirely unworthy of credence, and the jury were not justified in basing a verdict on such denial. There is, however, further uncontradicted evidence of actual notice of the happening of the accident given to plaintiff's representative in charge of his business on July ninth, four days after the accident, and again on July 24, 1913, and that plaintiff's son opened the letter of July twenty-fourth, and replied thereto on the letterhead of the plaintiff on July twenty-ninth.

Plaintiff's son, called as a witness by plaintiff, admitted that one of these letters was opened by him and answered by him, and that he had authority to open the mail during his father's absence in Europe. These letters would constitute under the law of the case as laid down in the charge made by the trial judge to the jury sufficient notice to plaintiff of the happening of the accident to O'Brien to render it obligatory upon plaintiff, under the terms of the policy of insurance, to give immediate notice thereof to the

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company. In finding in favor of the plaintiff the jury have not only given undue credence to the denial by plaintiff's manager of knowledge of the happening of the accident, which denial was entirely discredited by admissions made upon a former trial, but have utterly disregarded the proof of written notice addressed to plaintiff at plaintiff's place of business shortly after the happening of the accident, whereby those left by plaintiff in charge of plaintiff's business became possessed of knowledge of the happening of the accident.

The verdict of the jury, therefore, was against the overwhelming weight of evidence, and cannot be allowed to stand.

The judgment must, therefore, be reversed and a new trial ordered, with costs to appellant to abide the event.

BIJUR and PHILBIN, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

PETER A. KUERZI, Respondent, *v.* CARL MAIER and FRIEDA MAIER, Doing Business under the Firm Name and Style of Marx Maier, Appellants.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Carriers — assignment of bill of lading — sales — through rates.

Plaintiff's assignor purchased from defendant 1,000 bales of cotton compressed at the shipside New Orleans, terms sight draft attached to the bill of lading. At the time of the purchase the cotton was stored in Texas uncompressed and at defendant's suggestion it was shipped on a through bill of

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lading direct to a customer of plaintiff's assignor who was advised by defendants that they had obtained a through rate and would deduct fifty-one cents for one hundred pounds to New Orleans and in fact deducted at the rate of forty-nine cents one hundred pounds. Held, that plaintiff's assignor was entitled to deduct from the invoice only so much as represented the actual rate charge including compression though it appeared that all the railroads except that by which the cotton was shipped charged sixty-one cents one hundred pounds for a like transportation.

APPEAL by defendants from judgment of the City Court of the city of New York, entered on verdict directed in favor of plaintiff.

Frederic H. Cowden, for appellants.

Francis J. Kuerzi, for respondent.

GUY, J. Plaintiff's assignor, N. P. Sloan Company, on or about July 3, 1915, purchased from the defendants 1,000 bales of clean Texas millrun linters at four and three-eighth cents a pound, compressed shipside New Orleans, La.; terms, sight draft attached to bill of lading.

From subsequent correspondence it appears that at the time of the purchase the linters were stored at Fort Worth, Tex., uncompressed; that defendants suggested it would be just as well to ship the goods from Fort Worth on a through bill of lading direct to the customer of the plaintiff's assignor at Phillipsdale, R. I., the defendants when rendering invoice deducting for the freight from Fort Worth to New Orleans; that plaintiff's assignor instructed defendants to ship the goods to Phillipsdale by the cheapest route possible, stating in their letter to defendants dated July ninth: "You can then bill the linters up sending them forward freight

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collect, deducting freight to New Orleans, shipside compressed, from your invoice;" and in their reply of July tenth defendants said: "Please note I have arranged the cheapest possible freight rate with the Southern Pacific line, namely 85¢ per 100 lbs., same representing through rate from Fort Worth to Phillipsdale, R. I. via New Orleans and New York. * * * The lot will be moved over the Southern Pacific line from Fort Worth to New Orleans, and from there by the Southern Pacific boat to New York and then via Providence line to Phillipsdale, R. I. I shall bill the goods in accordance with your request, deducting freight from Fort Worth to New Orleans, namely 51¢ per 100 lbs. I have given instructions to consign the goods to 'order' Phillipsdale, notifying you at Philadelphia."

Before the delivery of the goods the invoice, bill of lading and sight draft were received by plaintiff's assignor, the Sloan Company; and there was deducted from the invoice freight at the rate of forty-nine cents per 100 pounds from Fort Worth, Tex., to shipside New Orleans, amounting to $2,631.88. The Sloan Company honored the draft but disputed the correctness of the credit, claiming that instead of deducting $2,631.88 there should have been deducted $3,243.33, the last figure being arrived at by calculating the freight from Fort Worth to New Orleans at sixty-one cents per 100 pounds instead of forty-nine cents as allowed by the defendants; and the action was to recover the difference of $611.45 with interest.

It appears from the evidence that all the railroads but one charge sixty-one cents per 100 pounds on linters from Fort Worth to New Orleans; that this rate included compression by the railroads; that the road which made the lower rate, said to be forty-nine and one-half cents, was the Texas Pacific; and defend-

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ants claim that the goods were sent over that line to New Orleans. Defendants' counsel tried to show what the respective freight rates were throughout the trip from Fort Worth to Phillipsdale and the portion of the eighty-five cent through rate that was paid to the respective carriers on the route; but the court sustained the objections of plaintiff's counsel to the questions, holding as matter of law from the correspondence that the defendants should have deducted sixty-one cents per 100 pounds from the invoice, and directed a verdict for the amount claimed in favor of plaintiff. Under the agreement of the parties the defendants were required to pay, in addition to the cost of compression, the actual expense of transporting the goods from Fort Worth to shipside New Orleans. Accordingly plaintiff's assignor was entitled to deduct from the invoice so much of the bill as represented the actual freight charge including compression; and the fact that the tariff rates (with the exception of the one applicable to the Texas Pacific road) would have called for a larger deduction did not authorize a credit of such tariff rate to the purchaser. If this construction be correct it was error to exclude proof of the actual cost of carriage, including compression, from Fort Worth to New Orleans.

If plaintiff does not contest the correctness of that claim, and the parties will so stipulate, judgment may be entered for the plaintiff for the difference between that rate and the forty-nine and one-half cents which defendants mistakenly deducted, with appropriate costs in the court below, and, as so modified, the judgment may be affirmed, without costs of this appeal. Otherwise it must be reversed and a new trial granted, with costs to appellant to abide the event.

PHILBIN, J., concurs.

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BIJUR, J. (concurring). Under the original contract between the parties plaintiff's assignor, the Sloan Company, was to pay a fixed price for the cotton delivered, compressed, at the shipside New Orleans. As the cotton was stored uncompressed at Fort Worth, Tex., it followed necessarily that defendants were to pay the cost of compression and shipment to New Orleans. From the nature of the agreement also, it is evident that it was of no interest to the Sloan Company how large or how small might be the freight rate to New Orleans which defendants were bound to pay. Plaintiff's interest under the contract lay solely in having the cotton delivered compressed at the shipside New Orleans. This then was the situation when the agreement was modified by the letter of defendants to the Sloan Company from which I extract the following: "As I understand you wish the goods shipped to New York and the through rate, according to information received here from Southern Pacific R. R., will be 71¢. Therefore, it will be cheaper for you if the goods are shipped on a through bill of lading to New York, than from Fort Worth to New Orleans and then from New Orleans to New York. It would be just as well to ship the goods from Fort Worth on a through bill of lading direct to your customer, and when rendering your invoice I will deduct for the freight from Fort Worth, Texas, to New Orleans, La."

In response thereto the Sloan Company wrote and wired defendants to ship the cotton to Phillipsdale, R. I. (rather than New York), by cheapest route. The through rate by this route was eighty-five cents, and defendants contend that they were bound to pay only the *pro rata* portion of that rate, which was apportioned to the carriers for compression and transportation from Fort Worth to New Orleans. When testi-

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mony as to the amount so apportioned was tendered by the defendants, the learned judge below excluded it on the ground that it "cannot have any possible bearing on the question of what you (defendants) are required to deduct under the agreement by which you agree to credit the plaintiff's assignor with the rate from Fort Worth to New Orleans, shipside."

As the contract stood originally, the Sloan Company was entitled to demand that the cotton be delivered compressed at the shipside New Orleans. The instruction to defendants to ship the cotton through to Phillipsdale, R. I., manifestly disposed of the requirement that it be delivered at New Orleans as completely as if the plaintiff had directed defendants not to move it at all from Fort Worth, or to ship it to St. Louis or some other point, to which transportation to New Orleans was not involved at all. In other words, the term of the contract requiring delivery at New Orleans and payment by the defendants for compression and carriage to that point as a terminus was abandoned by mutual consent. It would, of course, have been simpler and better had the parties made an agreement *expressly* determining their several rights and obligations under the modified agreement, but, in the absence of express provision, we are bound to give the contract a reasonable interpretation and imply those terms which, in the light of all the circumstances, it can be reasonably inferred that the parties intended to impose. The arrangement for the through shipment to Rhode Island was manifestly in the interest of economy and for the benefit of both parties. The Sloan Company had no desire to have the cotton stopped and stored in New Orleans with the necessity on its part of thereafter paying the local rate from that point to Phillipsdale, R. I., and the defendants, of course, had no interest in the shipment at all except

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to reduce so far as possible the expenses of compression and transportation to the point at which they had agreed to deliver it.

I think, therefore, that the modification expressed by the parties carried with it the implication that each should pay its appropriate *pro rata* of the through rate as apportioned between the carriers. Defendants claim that this *pro rata* for compression and carriage from Fort Worth to New Orleans was fifty-one cents, and the testimony offered by them on that point should have been admitted.

Judgment modified, and, as so modified, affirmed, without costs of this appeal.

VIRGINIA L. STONE, Appellant, *v.* WARREN G. DEMAREST, Respondent.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Pawnbrokers — redemption of pledge — General Business Law, § 44.

Under section 44 of the General Business Law, which declares that the holder of a pawn ticket shall be presumed to be the person entitled to redeem the pledge, the delivery of a pawn ticket is a valid consideration for the promise to redeem the property pledged.

APPEAL by plaintiff from a judgment of the Municipal Court of the city of New York, borough of Manhattan, third district, dismissing the complaint at the close of plaintiff's case.

Leon Laski, for appellant.

Morris & Plante (John J. Prendergast, of counsel), for respondent.

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GUY, J. This action is brought to recover damages for breach of contract, the complaint alleging that on or about September 20, 1910, defendant entered into an agreement with plaintiff, in consideration of plaintiff's promise to repay to defendant the money to be advanced by him and in consideration of plaintiff delivering to defendant at that time a pawn ticket for a diamond ring which she had pledged with a pawnbroker, whereby defendant agreed to redeem said ring for plaintiff, advancing therefor the sum of $124, being $100 borrowed by plaintiff on the ring and $24 interest, which would be the amount due at the expiration of the time for which the ring had been pledged; that defendant, in violation of his said agreement, failed to redeem said ring, but paid the interest thereon amounting to $24, leaving the ring still in pledge; that subsequently plaintiff tendered to defendant the amount of interest so paid by him and demanded the return of the pawn ticket; that defendant refused to return the pawn ticket, and subsequently neglected and failed to redeem the ring as agreed to by him, though frequently requested so to do by plaintiff, and that by reason of such neglect and breach of contract on the part of the defendant the time for which the ring was further pledged or left in pawn by the defendant expired, and the ring was sold by the pawnbroker, with a resulting damage to the plaintiff of the value of the ring less the amount advanced thereon to plaintiff with interest. Evidence was introduced by plaintiff fully establishing the above facts.

At the close of plaintiff's case defendant moved for a direction of a verdict on the ground that plaintiff had failed to make out a cause of action, the alleged contract with defendant being void for lack of consideration; and the court subsequently granted the motion on the ground of lack of consideration. In this

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the learned trial court erred. If the promise of the defendant to advance the money and redeem the ring from pawn had been based solely on plaintiff's promise to repay the amount so advanced, the contract would have been without consideration; but the delivery of the pawn ticket by plaintiff to defendant at the time of the making of the contract was a good and valid consideration for the contract entered into by defendant. In delivering the pawn ticket to defendant, plaintiff parted with a thing of value, her right of redemption of the ring, which right she thus transferred to the defendant.

The General Business Law (art. 5, § 44), relating to pawnbrokers, provides: "The holder of such memorandum or note shall be presumed to be the person entitled to redeem the pledge, and the pawnbroker shall deliver such article to the person so presenting such memorandum or note on payment of principal and interest."

It is elementary that a change of position on the part of one party to a contract on the faith of the promises made by the other party to the contract, and in carrying out the purpose for which the contract is made, constitutes a valid consideration. Any detriment suffered or any legal right given up or forborne by the promise is a sufficient consideration for an agreement. See *Grossman* v. *Schenker*, 206 N. Y. 466; 9 Cyc. 311, 312; *Hamer* v. *Sidway*, 124 N. Y. 538; Pars. Cont. 444; *Melville* v. *Kruse*, 174 N. Y. 306.

The authority relied upon by respondent (*Thorne* v. *Deas*, 4 Johns. 84, 96) is not in point in that the plaintiff therein did not forego or surrender any right. The defendant promised, without consideration, to perform gratuitously for plaintiff the act of insuring a vessel in which plaintiff had an interest, but plaintiff did not forego his own right to effect such insurance.

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In the case at bar plaintiff surrendered to defendant a pawn ticket which carried with it an absolute right to possession of the ring upon tender to the pawnbroker of the amount of the pledge with interest, and divested herself of such right, the ticket not having been lost or mislaid so as to entitle plaintiff to the issuing of a new ticket on application to the pawnbroker, and having been voluntarily transferred by plaintiff for a valid consideration to defendant.

The judgment must, therefore, be reversed and a new trial granted, with thirty dollars costs to appellant to abide the event.

BIJUR and PHILBIN, JJ., concur.

Judgment reversed and new trial granted, with thirty dollars costs to appellant to abide event.

JACOB MYERS, Appellant, *v.* JOSEPH S. KLEIN, Respondent.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Default — judgment by — motion to open — Municipal Court of city of New York — Code Civ. Pro. § 1913.

Where it is admitted that the object of an action instituted in plain violation of section 1913 of the Code of Civil Procedure upon a judgment by default was to increase the amount of the judgment so that supplementary proceedings could be instituted thereunder, the entry of the second judgment is unauthorized, but defendant has no standing in court except to move to open his default.

A justice of the Municipal Court of the city of New York has no authority to vacate a judgment entered by another justice of the same court.

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APPEAL by the plaintiff from an order of the Municipal Court of the city of New York, borough of Manhattan, third district, granting a motion made by the defendant to vacate a judgment entered in favor of the plaintiff and also from an order granting a stay of proceedings.

Haskel Corenthal, for appellant.

William Duncan Cameron, for respondent.

GUY, J. The record in this case discloses a most extraordinary situation. Plaintiff brought an action against the defendant, claiming in his complaint that there was due him from defendant the sum of seven dollars and fifty cents. The summons was personally served upon the defendant and he defaulted and a judgment was entered against him for the sum of ten dollars and eighteen cents. This judgment was subsequently increased by an addition thereto of two dollars and fifty cents costs, making in all the sum of twelve dollars and sixty-eight cents. On February 5, 1916, thirty-eight days after the entry of this judgment, the plaintiff began a second action, again serving a summons and complaint. In this last complaint he sets up the recovery of the prior judgment and asserts that the amount is fifteen dollars and nine cents; that no part of the same has been paid and asks judgment for that amount. How or in what manner the amount of the judgment has been increased from twelve dollars and eighteen cents to fifteen dollars and nine cents does not appear.

Upon the return day of the summons the defendant interposed an answer in which he set up that the complaint failed to state a cause of action; that ten years had not elapsed since the recovery of the former judg-

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ment; that the action had been commenced by personal service of the summons; that no leave to commence the action had been given and asked for a dismissal of the complaint. This objection could have been disposed of before trial under section 89 of the Municipal Court Code. The defendant defaulted, however, at the trial and an inquest was taken and judgment rendered against the defendant for the sum of about twenty-eight dollars. This last judgment was entered on February 24, 1916. Upon an order to show cause returnable on March 7, 1916, the defendant moved before another justice of the Municipal Court for an order vacating this last judgment. Upon the return day of this motion the plaintiff's attorney asked for additional time in which to file a brief, which was granted and all proceedings stayed until the hearing of the motion. The motion was granted on March 29, 1916, and the judgment of February 24, 1916, vacated. From the order vacating the judgment and from the order granting a stay the plaintiff appeals.

It is perfectly plain that there was no authority for the entry of a second judgment against the defendant. The action was instituted in plain violation of the provisions of section 1913 of the Code of Civil Procedure and its object, substantially admitted by plaintiff's attorney, was to increase the amount of the judgment so that summary proceedings could be instituted thereunder.

A reading of the opposing affidavit made by the plaintiff's attorney and used in opposing the motion resulting in the order appealed from would indicate that this is not the only case in which the same practice has been indulged in. The defendant, however, has no standing in court, except to move to open his default and we know of no authority recognizing the right of one justice of the Municipal Court to vacate a judg-

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ment entered by another justice and there is authority against it. *Borgia & Patane Inc.* v. *Paris*, 92 Misc. Rep. 211.

The order appealed from being one of those which the court had not the power to make is appealable and must be reversed, but without costs.

Order vacating judgment reversed, without costs, and with leave to defendant to move to open his default upon the last judgment entered against him.

BIJUR and PHILBIN, JJ., concur.

Order reversed.

LOUIS BRAND, Appellant, *v.* H. A. IMPROVEMENT COMPANY and LOUIS SILVERBLATT, Respondents.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Contempt — special proceeding — attachment — Municipal Court Code, § 154(2).

Attachment — when order to vacate reviewable — motions and orders — appeal.

While a proceeding to punish for a contempt is a special proceeding, and the final order is appealable under section 154(2) of the Municipal Court Code, no appeal lies from an order denying the motion of a witness to vacate an attachment against him where nothing was done thereunder except to release him from arrest upon giving security.

An order denying the motion to vacate the attachment is reviewable only on appeal from the final order made in the proceeding when the intermediate order is specified in the notice of appeal and necessarily affects the final order.

APPEAL by Samuel Silinsky, a witness in this action, from an order of the Municipal Court of the city of New York, borough of the Bronx, second district, denying his motion to vacate an attachment against his person.

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Henry Gilbert, for appellant.

Wm. J. Lippmann, for respondent H. A. Improvement Company.

Charles Kraft, for respondent Louis Silverblatt.

GUY, J. The trial of this action had been set down for January 12, 1916. Upon the call of the calendar the case was marked "ready." The appellant herein, one Silinsky, had been subpoenaed as a witness on the part of the defendant but failed to appear. An attachment was thereupon applied for by the defendant Improvement Company, and issued by the trial justice and the case adjourned until January 19, 1916. The attachment was returnable on January 14, 1916, and was served on appellant on January thirteenth, and he deposited twenty-five dollars with the clerk of the court as security and was released from arrest. The case was tried on January 19, 1916, and nothing further, as regards the disposition of the warrant of attachment, seems to have been done until February 17, 1916, when the appellant made a motion to vacate it. This motion came up for hearing before a justice other than the one who issued the attachment and was denied by him upon the ground that a prior similar motion had been made and denied by the justice who granted the attachment. There is no proof of this in the present record, and the contrary appears by the affidavit of the appellant. That is not important however in the determination of the present appeal. The defendant Improvement Company urged that the order is not an appealable one but gives no reasons therefor. I am of the opinion, however, that the order cannot be made the subject of review by a direct appeal therefrom. There can be no doubt that

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a proceeding taken to punish for a contempt is a special proceeding. The Municipal Court Code (§ 154, subd. 2) permits an appeal from: "A final order in a special proceeding." The former Municipal Court Act provided for an appeal only from a final order in a "summary proceeding." The order appealed from in this case, however, is not a final order. The proceedings under the warrant of attachment have not, as yet, been finally adjudicated. They were held in abeyance until after the trial of the action and so far as appears still remain in that condition. Section 155, Municipal Court Code, declares that: "An appeal taken from a judgment or final order brings up for review an intermediate order which is specified in the notice of appeal etc." When the proceedings instituted by the issue of the warrant of attachment are finally ended a final order will undoubtedly be entered from which an appeal will lie and an intermediate order can also be reviewed upon such appeal, if it is specified in the notice and necessarily affects the final order.

BIJUR and PHILBIN, JJ., concur.

Appeal dismissed, with ten dollars costs.

MAX MARX, Appellant, *v.* NEW YORK RIBBON COMPANY, Respondent.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Contracts — recovery for breach of — wrongful discharge from employment — evidence — damages.

Upon the wrongful discharge of one employed at a weekly salary he is entitled to recover as damages for breach of the contract such a sum as it is reasonably certain may follow such

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breach, determinable approximately by a jury upon reasonable conjecture and probable estimate.

Ordinarily the damages recoverable in an action for wrongful discharge from employment would presumptively be the amount of the plaintiff's salary due at the time of the trial, less his actual earnings up to that time and those that would become due after the trial being reduced by the amount of his future earnings.

The fact that plaintiff after his discharge became ill furnished no presumption, in the absence of proof of the character of the illness, that it would have arisen had he continued in the employ of defendant, or that it would have justified a suspension of payment on the part of the employer.

Where there was not a scintilla of proof which would have justified the jury in finding that had plaintiff continued in defendant's employ he would have been unable to perform his contract, and it appears that he made all reasonable effort to obtain other employment and failed to do so, it was error to give judgment only for the amount of salary plaintiff would have earned for three out of the seven weeks of the unexpired term of the contract broken by defendant.

Bijur, J. dissents.

APPEAL from a judgment of the Municipal Court of the city of New York, borough of Manhattan, seventh district, entered by direction of the court after a trial without a jury.

Nathaniel Phillips (Henry Marx, of counsel), for appellant.

Loeb, Bernstein & Ash (Mortimer B. Bernstein, of counsel), for respondent.

GUY, J. The action is for breach of contract of employment. A cross appeal by plaintiff from the same judgment on the ground of inadequacy is also on the calendar at this term. The employment of plaintiff and his unjustifiable discharge by the defendant

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is clearly proven. The employment was at a salary of forty dollars per week. At the time of the wrongful discharge, plaintiff became entitled to recover as damages for the breach of the contract such sum as it is reasonably certain actually might follow such breach determinable approximately by a jury upon reasonable conjecture and probable estimate. *Davis* v. *Dodge,* 126 App. Div. 469, 471; *Wakeman* v. *Wheeler & Wilson Mfg. Co.,* 101 N. Y. 205. Ordinarily such damages would presumptively be the amount of the employee's wages or salary due at the time of the trial, less his actual earnings up to that time, and those that would have become due after the trial being reduced by the amount of his future earnings. *American China Development Co.* v. *Boyd,* 148 Fed. Rep. 258.

In *Davis* v. *Dodge, supra* (Gaynor, J., writing the opinion), the court says: "The rule is settled in England and here that the employee has an immediate right of action on the breach for his entire damage. * * * The question must therefore come down to one of proof, *i. e.,* the plaintiff may recover all the damages he can prove, whether up to the time of the trial, or not up to that time, or up to the end of the contract period, whether it be before or after the trial. * * * The plaintiff in such an action, the same as in other actions, should be able to recover such damages as may be fairly or reasonably estimated from his proofs, taking all the facts, probabilities, certainties and uncertainties into consideration."

In *Cutter* v. *Gillette,* 163 Mass. 95, the court held: "For this breach he (the plaintiff) can have but one action. In estimating his damages the jury have the right to consider the wages which he would have earned under the contract, the probability whether his life and that of the defendant would continue to the end of the contract period, whether the plaintiff's work-

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ing ability would continue, and any other uncertainties growing out of the terms of the contract, as well as the likelihood that the plaintiff would be able to earn money in other work during the time."

But while proof of condition of health of the plaintiff before his discharge, or of his death thereafter during the term of the contract, as bearing upon the question of his ability to perform his contract for the entire term, may be considered by the jury where the facts and circumstances proven furnish a competent basis for such consideration, the mere fact of illness after his discharge does not furnish such competent basis for the consideration of the jury. The fact that the employee, after his discharge, became ill furnishes no presumption, in the absence of proof of the character of the illness, that the illness would have arisen had he continued in his employment or that it would have been of such a character as, under the terms of his employment, would have justified a suspension of payment on the part of the employer. In the absence of competent evidence as to the nature and character of the illness and the circumstances under which it developed, it is reasonably to be inferred that the illness might result from the character of some new employment, which the employer's breach had compelled the employee to undertake, to lack of earnings sufficient to properly maintain health, because of his wrongful discharge, or to various other causes which might not have existed had he been allowed to continue his employment under his contract. To permit an employer guilty of breach of his contract to thus derive advantage from the probable results of his wrongful act would be subversive of justice. In this case there is not a scintilla of proof which would justify the jury in finding that had plaintiff continued in defendant's employ he would have been unable to fully

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perform his contract. The presumption is that he would have been able to perform his contract and enjoy the full benefits thereof. The evidence shows that he made all reasonable effort to obtain other employment and failed to do so. The trial judge, acting without a jury, erred, therefore, in giving judgment only for the amount of salary he would have earned for three out of the seven weeks of the unexpired term of the contract broken by defendant. Plaintiff was entitled to judgment for the salary for the full unexpired term of seven weeks at forty dollars per week, amounting to $280.

The judgment must, therefore, upon plaintiff's appeal, be modified by changing the amount to two hundred and eighty dollars, with appropriate costs in the court below, and as so modified affirmed, with twenty-five dollars costs of appeal to the plaintiff. Upon defendant's appeal judgment affirmed with twenty-five dollars costs to plaintiff.

PHILBIN, J., concurs.

BIJUR, J. (dissenting). I dissent on the ground that where an action is brought for a wrongful discharge after the term of the original employment has ended and defendant shows that plaintiff was incapacitated by illness from working and thereby from earning wages during a period within the term, the damages recoverable should be reduced by the amount of the compensation provided by the contract of employment for the period of incapacity. *Hughes* v. *Toledo Scale Co.*, 112 Mo. App. 91, 101, inadvertently cited for the contrary proposition in Labatt Mast. & Serv. § 396, subd. f, p. 1205. I do not doubt that there may be cases in which the plaintiff may in reply be able to show that such deduction should not be made, but

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there is no suggestion, either by way of proof or argument, of any such condition in the case at bar.

In my opinion the judgment should be affirmed.

Judgment upon plaintiff's appeal modified, and as so modified affirmed, with twenty-five dollars costs. Upon defendant's appeal judgment affirmed, with twenty-five dollars costs.

ALEXANDER O. LEVY, Respondent, v. METROPOLITAN LIFE INSURANCE COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Appeal — notice of — from judgment of Municipal Court of city of New York — actions — costs.

Discontinuance — practice in Supreme Court as to right of suitor to discontinue — motions and orders — actions.

Under section 155 of the Municipal Court Code an appeal from a judgment of the Municipal Court of the city of New York brings up for review any order made after the entry of the judgment and specified in the notice of appeal.

The practice in the Supreme Court as to the right of a suitor to discontinue an action commenced by him applies to the Municipal Court of the city of New York.

No judgment may be entered on an order granting a motion for the discontinuance of an action.

Where a motion by plaintiff to discontinue an action brought in the Municipal Court of the city of New York is granted, the clerk must tax the costs fixed by the statute.

Under section 125 of the Municipal Court Code a plaintiff who has been granted leave to discontinue an action may not begin a new action until payment of the costs taxed on said motion.

Where upon the discontinuance of an action on plaintiff's motion he failed to pay the costs as taxed, defendant may move for a dismissal of the case under section 126 of the Municipal Court Code.

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Though a judgment for costs entered in favor of defendant upon granting plaintiff's motion to discontinue an action is irregular, defendant is not injured and may not appeal from the judgment.

APPEAL by defendant from judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, dismissing the complaint of the plaintiff without prejudice to a new trial and from an order denying defendant's motion to set aside said judgment and dismiss the complaint upon the merits.

Butcher, Tanner & Foster (James N. Luttrell, of counsel), for appellant.

Ellis V. Levy, for respondent.

GUY, J. The record in this case shows that the parties went to trial upon April 26, 1916. That after the testimony on both sides had been given and both parties had rested the defendant moved to dismiss the case upon the merits. After some discussion between the court and the attorneys for the respective parties the plaintiff's attorney said, "I will discontinue the case, if your Honor please." The defendant's attorney said he did not think the plaintiff could discontinue "after the case was in and both sides have rested." The court, however, granted the motion to discontinue and subsequently, by direction of the trial justice, a judgment was entered dismissing the complaint without prejudice to a new action, with costs against the plaintiff, and in favor of the defendant. The defendant then moved to have the judgment set aside and also the order dismissing the complaint without prejudice to a new action, and to have an order entered dismissing the complaint upon the merits.

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This motion was denied and an order amending the first order was entered. The defendant appeals from the judgment and the two orders.

The plaintiff claims in his brief that the defendant has appealed from a nonappealable order only, but the notice of appeal states that it is from "the decision and judgment" entered, etc. The notice of appeal also refers to the subsequent orders and, therefore, brings up for review any order entered after the entry of the judgment and specified in the notice of appeal. Municipal Court Code, § 155.

Under the provisions of the former Municipal Court Act (§ 248) a judgment that the action be dismissed, with costs and without prejudice to a new action, could be entered when the plaintiff voluntarily discontinued the action before it was finally submitted. This provision has not been carried into the Municipal Court Code. Section 119 of the Municipal Court Code, which declares that the justice must render his judgment within fourteen days from the time when the case is "submitted for that purpose," has no application to the time when an action may be discontinued. There seems to be nothing in the Municipal Court Code which determines when an application for leave to discontinue an action may be granted. Section 125 of the Municipal Court Code, which superseded section 248 of the former act, is silent upon that subject. Section 1182 of the Code of Civil Procedure declares that in an action tried before a jury it is not necessary to call the plaintiff, when the jury are about to deliver their verdict, and that in such an action the plaintiff cannot submit to a nonsuit "after the cause has been committed to the jury to consider their verdict." In the absence of any express provision in the Municipal Court Code the practice in the Supreme Court would apply. Municipal Court Code, § 15. In the case of

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Matter of Butler, 101 N. Y. 307, it was held that ordinarily a suitor has a right to discontinue any action or proceeding commenced by him and his reasons for so doing are no concern of the court. See also *Harrigan* v. *Prendergast*, 94 Misc. Rep. 151. It has been held that, on motion for leave to discontinue, the proper practice is to enter an order of discontinuance on payment of costs, if such terms are imposed, and that no judgment can be entered upon such an order (*Hyde* v. *Anderson*, 112 App. Div. 76; *Anderson* v. *Norton*, 158 N. Y. Supp. 152; *Bien* v. *National Surety Co.*, 95 Misc. Rep. 194), and that if the plaintiff failed thereafter to take the proper steps or to proceed with the action the defendant's remedy was to move to dismiss the complaint for failure to prosecute. In the Municipal Court Code there is no provision made for the dismissal of the action for failure to prosecute, except when the case has been upon the reserved calendar for more than six months. Municipal Court Code, § 126. What then is the remedy of a defendant when the plaintiff has been allowed to discontinue his action? Such leave is granted upon motion and must result in an order.

Upon such an order no judgment can be entered. *Hyde* v. *Anderson, supra.* Section 164, subdivision 9, provides that where a plaintiff discontinues before trial costs shall be awarded to the defendant, as provided in subdivision 8 of that section, and that where the plaintiff discontinues during trial costs shall be awarded as provided in subdivision 7 of that section. Subdivision 7 of that section refers to subdivision 1 of section 164, and subdivision 1 provides for costs to the defendant at rates graded according to the amount of recovery. Costs upon a discontinuance of a plaintiff, either before or after trial, are, therefore, not discretionary with the justice, but are fixed by the

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statute, and when, therefore, a plaintiff is allowed to discontinue his action, costs should be taxed by the clerk. *Bien* v. *National Surety Co., supra.* We do not decide whether or not an execution could be issued thereon, under the provisions of section 779 of the Code of Civil Procedure. See Code Civ. Pro. § 3347, subd. 6.

All subsequent proceedings on the part of a party who is required to pay the costs of either a judgment or an order are automatically stayed, until their payment, by section 125, Municipal Court Code, and the plaintiff in such a case could not proceed with a new action until such payment was made. Unless such costs were paid the right to dismiss under section 126 would eventually accrue. In the case at bar a judgment was entered in favor of defendant. When the plaintiff moved to dismiss, the defendant did not state that he would be prejudiced in any way by the discontinuance of the action.

The plaintiff does not appeal from the judgment so entered against him, and the defendant has no cause of complaint.

The court below had no discretion as to imposing terms and was compelled to allow the discontinuance under the circumstances. If the judgment is irregularly entered, the defendant is not injured and has no grievance nor any standing to appeal from the judgment.

BIJUR and PHILBIN, JJ., concur.

Appeals dismissed, without costs.

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Rody McNamara, Respondent, v. United Distillers Company, Inc., Appellant.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Warehouseman — provision of warehouse receipt — sales — contracts

A provision of a warehouse receipt that no title to whiskey sold should pass until full payment of the purchase price in cash at the executive office of the seller constitutes notice to the purchaser that the seller's agent had no authority to receive payment.

An agent has no implied authority to accept payment of the price of goods sold by him where in the written papers passing the title there is an express notification that the agent has no such authority.

Bijur, J. dissents.

Appeal by defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, in favor of plaintiff, after a trial before the court without a jury.

Sachs & Spitzer (Louis Sachs, of counsel), for appellant.

Omar Powell, for respondent.

Guy, J. Defendant appeals from a judgment in favor of plaintiff in an action brought to recover money paid for five barrels of whiskey purchased by plaintiff from an agent of the defendant, which whiskey defendant subsequently refused to deliver to plaintiff.

Plaintiff's evidence established that plaintiff purchased the whiskey from one Roser, an agent of the defendant, at Deadwood, S. D., receiving from said agent a duplicate copy of an order therefor, written

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upon a blank furnished by defendant's agent, the other duplicate copy being retained by the agent; and receiving also, at the same time, upon payment by plaintiff to said agent of the purchase price of the whiskey, a warehouse certificate signed by the defendant company, which warehouse certificate contained the following clause: "It is expressly understood that no title to the herein described whiskey shall pass until the full purchase price in cash thereof or the notes given therefor at the time of maturity of each and every one of said notes shall have been paid to the undersigned at its executive offices."

This certificate was offered in evidence by plaintiff, and constituted notice to plaintiff that defendant's agent had no authority to receive cash payment, and that title to the whiskey would only pass to the purchaser upon payment of the purchase price in cash at the executive office of the defendant company.

Subsequently plaintiff demanded delivery of the whiskey from defendant and defendant demanded payment therefor at the executive office of the defendant. Upon being informed that plaintiff had paid defendant's agent in cash the purchase price of the whiskey in Dakota, defendant repudiated such payment and stated that said agent had no authority to receive cash payments. Defendant, on the trial, offered further proof that Roser had no authority to receive payments in cash, but was limited in his authority to receive notes payable at the office of the company. In view of such notice to plaintiff there is no force in the contention of the plaintiff-respondent that defendant's agent, Roser, having authority to convey title, had implied authority to receive cash in payment thereof. Implied authority on the part of an agent to do a particular thing cannot exist where there is express notification that the agent has no such authority.

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Payment of the purchase price of the whiskey in cash at the office of the company being by the very terms of the contract of sale a condition precedent to the conveyance to plaintiff of title to the whiskey or a right to demand delivery of the same, and plaintiff having failed to prove the performance of such condition precedent, no cause of action was made out by plaintiff, and the defendant was entitled to a dismissal of the complaint.

Judgment must, therefore, be reversed, with thirty dollars costs, and the complaint dismissed, with costs.

Philbin, J., concurs.

Bijur, J. (dissenting). I dissent. In the first place the inscription quoted in the opinion of Mr. Justice Guy is comparatively in very small type on the "warehouse receipt" of defendant, and I have grave doubt whether the plaintiff can be chargeable, as matter of law, with notice thereof under familiar principles. But assuming that he had read it, I do not agree that it constitutes notice that no title to the goods sold is passed until payment in cash *exclusively* at the office of defendant. The language, to my mind, is quite capable of the construction that no title passed until payment of the purchase price, the stress being on the fact of payment and not that it should be made at the company's executive offices rather than to its apparently duly authorized agent. Even, however, if the inscription standing by itself is not open to that doubt, it surely ceases to have the effect claimed by the defendant in view of the other facts disclosed by the evidence. Thus, the salesman, Roser, delivered to plaintiff a purchase slip furnished by the defendant as part of its regular course of business. After the recital of a purchase — to be signed by the purchaser — with descrip-

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tion of the goods and the price, it contains the significant inscription in prominent type: "Terms, Cash, $——; notes, $——; payable ———." And finally the inscription "Remarks." Under the head "Terms, Cash, $——" the salesman had written in the full price, "$150.23," and under the inscription "Remarks" he had written "Paid in full." As I understand the expression "sale for cash," it means cash paid on the delivery of something, and in this case the thing which the purchaser received was a *warehouse receipt* calling for the delivery of the goods. It is true that by a species of casuistry one might understand that the phrase "cash" meant cash to be paid on the delivery of the *barrels of whiskey* under the obscure terms of the warehouse receipt, but such a construction, it seems to me, would be equivalent to providing a trap to catch a perfectly *bona fide* purchaser into paying twice for the same goods. I do not mean to insinuate that the defendant had any such purpose in mind, but surely in the case of a *bona fide* transaction a construction, so manifestly unfair to the purchaser, of papers prepared by the defendant itself, cannot be adopted.

In my opinion the agent, having been intrusted by the defendant with all the indicia of title and with papers containing the plain intimation that the agent was authorized to receive payment in cash on defendant's behalf, the inscription on the warehouse receipt was quite insufficient to give notice to the contrary, or even to put a purchaser of reasonable intelligence on notice or inquiry.

The judgment should be affirmed.

Judgment reversed, with thirty dollars costs.

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ARTHUR S. LEVINE, Respondent, v. KOSHER MATZOTHS BAKING COMPANY, INC., Appellant.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Evidence — when admissible — when entitled to introduce proof in contradiction of testimony as to acceptance — pleading — costs — Municipal Court Code, § 93(2).

Where the answer in an action for the breach of a contract for the sale and delivery of goods is a general denial, evidence on behalf of defendant tending to show that goods delivered were not in accordance with the contract is admissible.

In such case defendant is also entitled to introduce proof in contradiction of plaintiff's testimony as to acceptance of the last delivery of the merchandise without raising the objection that they were not in accordance with the contract.

The imposition of costs as terms of granting an amendment to the answer, no claim being made of surprise or prejudice, was not "just" within the meaning of section 93(2) of the Municipal Court Code, nor a proper exercise of discretion, as the evidence sought to be introduced was admissible under the general denial.

APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, second district, in favor of plaintiff, entered by direction of the court after a trial without a jury.

Nathan D. Shapiro, for appellant.

Goldstein & Goldstein (Jonah J. Goldstein, of counsel), for respondent.

GUY, J. The action is brought to recover damages for breach of contract for the sale and delivery of goods.

The complaint alleges a delivery of part of the order and a refusal by defendant to pay therefor, and subse-

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quent notice by defendant to plaintiff that it would not receive any more of the goods ordered, and a refusal by defendant to comply with its agreement.

The answer is a general denial.

Plaintiff testified to the making of the contract; to a delivery of part of the goods and payment therefor by defendant on delivery; to a subsequent delivery of an additional quantity of the goods and an acceptance thereof by defendant, with the statement that no question was raised as to their being in accordance with the contract, and a promise to pay therefor the following day; to a subsequent refusal to pay therefor on the ground that they were not in accordance with the contract, and a notification to plaintiff to take back the goods last delivered. Defendant then sought to introduce evidence showing that the goods delivered were not in accordance with contract, and negativing plaintiff's testimony as to defendant's unconditional acceptance of the last delivery of goods. This evidence was excluded by the learned trial judge, holding that such proof was inadmissible under defendant's general denial. The exclusion of this evidence was error. The complaint alleged performance, and the answer denied performance by plaintiff. Under such denial defendant was entitled to introduce any evidence tending to show nonperformance by plaintiff of the terms of his contract. *Bettenhasser* v. *Templars of Liberty,* 58 App. Div. 61; *Milbank* v. *Jones,* 141 N. Y. 340; *Benton* v. *Hatch,* 43 Hun, 142; affd., 122 N. Y. 322. Defendant was also entitled to introduce proof in contradiction of plaintiff's testimony as to acceptance of the last delivery of the merchandise. While the amendment asked for by the defendant was unnecessary, as the evidence sought to be introduced was admissible under the general denial, we are of opinion that the imposition of costs as terms for the granting of an

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amendment of the character applied for, where no claim of surprise or prejudice is made by the other side, is not "just," as required by section 93, subdivision 2 of the Municipal Court Code, and is not a proper exercise of the discretion vested in the trial judge by said section.

The judgment must, therefore, be reversed and a new trial ordered, with thirty dollars costs to appellant to abide the event.

BIJUR, and PHILBIN, JJ., concur.

Judgment reversed and new trial ordered, with thirty dollars costs to appellant to abide event.

MICHAEL BROOK, Appellant *v.* BENJAMIN A. LEVINSON and EDGAR C. BESSELS, Respondents.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Judgments — dismissing action upon merits — Municipal Court Code, § 125.

Evidence — when incompetent — trade customs.

Under section 125 of the Municipal Court Code which declares that a judgment dismissing an action may be either on the merits or without prejudice to a new action, a dismissal upon the merits is equivalent to a judgment for defendants on all the issues.

A loose sheet from defendants' order book purporting to show their account with plaintiff is incompetent in the absence of proof as to the manner in which the book was kept or that the book from which the leaf was taken accurately recorded all transactions in connection with defendants' business covering the period in question.

Evidence of defendants' usual custom of requiring a written confirmation of an order for goods is insufficient to establish a trade custom binding on plaintiff and not shown to be within his knowledge.

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APPEAL by plaintiff from a judgment of the Municipal Court of the city of New York, borough of Manhattan, fourth district, in favor of defendants, dismissing the complaint on the merits, with costs, after a trial by the court without a jury.

Val. B. Baggott (Samuel Katz, of counsel), for appellant.

Bassett, Thompson & Gilpatric (W. H. Gilpatric, of counsel), for respondents.

GUY, J. Plaintiff appeals from a judgment dismissing the complaint on the merits after the introduction of evidence by both plaintiff and defendant and the close of the case by both plaintiff and defendant. It is contended by the appellant that there being an issue of fact the court had no power to dismiss the complaint on the merits, but was required to render judgment in favor of either plaintiff or defendant. Section 125 of the new Municipal Court Act provides: "A judgment dismissing the action may be rendered either on the merits or without prejudice to a new action, as the case requires." A dismissal upon the merits is the equivalent of a judgment for defendant on all the issues presented to the court. See *Deeley* v. *Heintz,* 169 N. Y. 129, 135; *Bass* v. *Phoenix Ins. Co.,* 161 App. Div. 296; *Niagara Fire Ins. Co.* v. *Campbell Stores,* 101 id. 400.

The decision in *Bowen* v. *Farley,* 113 App. Div. 767, to which our attention was invited, was under the old Municipal Court Act and is entirely superseded by section 125 of the present act.

A more serious question is presented by the evidence admitted, over plaintiff's objection and exception, in connection with a loose sheet from defendants' order

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book, used in their business, written by themselves and never shown to the plaintiff. Defendants' witness testified: "This is the sheet in our book under which the orders and deliveries to M. Brook & Company are entered." The question was then asked: "Q. Looking at that sheet, Mr. Bessels, can you state whether there is any order on your books from Brook & Company?" This was objected to as incompetent, irrelevant and immaterial, calling for a conclusion, and that the paper was a self-serving declaration. The objection was overruled and an exception taken. The witness then answered: "There is not." Defendants' counsel then offered the sheet in evidence, and the court asked: "Do I understand this is a loose leaf from your book? A. Yes. Q. Taken from your regular account with this plaintiff? A. Yes, sir." The objection was then overruled, under plaintiff's exception, and the sheet marked in evidence. No other foundation was laid for the admission of the sheet than the testimony that it was a loose leaf from defendants' regular account with the plaintiff. There was not even the customary proof as to the manner in which the book was kept or that all orders obtained were entered as of the date of the order, or that the book from which the leaf was taken accurately recorded all transactions in connection with defendants' business covering the period in question. By admitting such evidence the court permitted defendants to make the mere omission of an act on their part corroborative evidence in contradiction of plaintiff's proof of the giving of the order. It could not be contended seriously that plaintiff would be allowed to recover against defendants upon mere proof that upon a certain date plaintiff had entered in its books an order for merchandise to be obtained from defendants. The converse of the proposition must be equally true that defendants cannot disprove

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plaintiff's evidence of the actual giving of an order for merchandise by mere proof that defendants made no entry thereof in their books. The admission of this evidence was highly prejudicial and renders a reversal necessary.

Again, over plaintiff's objection and exception, defendants were allowed, under guise of proving an established custom in the silk trade requiring a written confirmation of an order before it is deemed to be binding, to introduce evidence as to their usual practice in that regard. Plaintiff's counsel moved to strike out the evidence on this point as incompetent, irrelevant and immaterial, which motion was denied with an exception to plaintiff. Defendant failed, either by direct testimony of their own witnesses or on cross-examination of plaintiff's witnesses, to prove such a custom of the silk trade in that regard as would be binding upon the defendants, and defendants' usual practice, which they were allowed to prove, was not shown to be within the knowledge of the plaintiff. *Levinson* v. *McKenna,* 126 N. Y. Supp. 604; *Hart* v. *Cart,* 144 id. 44; *Walls* v. *Bailey,* 49 N. Y. 464; *Goldsmith* v. *Newwitter,* 10 Misc. Rep. 36. The admission of this evidence was error.

The judgment must be reversed and a new trial ordered, with thirty dollars costs to appellant to abide the event.

BIJUR and PHILBIN, JJ., concur.

Judgment reversed and new trial ordered, with thirty dollars costs to appellant to abide event.

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ARTEMAS WARD, Doing Business Under the Trade Name of WARD & GOW, Appellant, v. JEWISH LEADER PUBLISHING COMPANY, INC., Respondent.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Pleading — in Municipal Court of city of New York — contracts — corporations — what may be included in answer.

In an action brought in the Municipal Court of the city of New York on a contract signed by the secretary of a corporation as such, defendant, under an answer which simply denies the making of the contract alleged in the complaint, is entitled to show that his secretary was not authorized to sign the contract because of defendant's failure to comply with section 92 of the Municipal Court Code which provides that "A signature to a written instrument which is pleaded shall be taken as admitted unless the party sought to be charged thereby files with the clerk, within eight days after joinder of issue, a specific denial of the genuineness of the signature and a demand that it be proved. Such denial and demand by a defendant may be included in his answer."

APPEAL by plaintiff from a judgment of the Municipal Court of the city of New York, borough of Manhattan, ninth district, dismissing the complaint.

Everett, Clark & Benedict (George W. Martin, of counsel), for appellant.

Henry Kuntz (Abraham P. Wilkes, of counsel), for respondent.

GUY, J. Plaintiff appeals from a judgment entered by direction of the court dismissing the complaint after a trial before the court without a jury.

The action is for breach of a written contract, which the complaint alleges was entered into between plaintiff and defendant whereby plaintiff agreed to render

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certain services in handling, distributing and collecting defendant's publication *Jewish Leader* to newsstands of the Manhattan Elevated Railway and Subway Systems of the Interborough Rapid Transit Company, to maintain said publication on sale each month during the period stated in the agreement, and to pay defendant for all copies sold by plaintiff at the trade price of sixty cents per 100; and defendant agreed to pay thirty dollars each month in advance for such service, with the understanding that if the total sales of each month exceeded 7,500 copies the charge of thirty dollars for distributing service should be cancelled.

The written contract, which was introduced in evidence, bears the signature: "Jewish Leader Publg. Co., A. Hillman, Sec'y."

The answer denies the making of the contract alleged in the complaint.

The two questions involved on this appeal are: *First,* whether said Hillman, who signed the contract for the defendant and who was also a director of the company, was duly authorized to make said contract, or, if not so authorized, whether the contract was subsequently ratified by defendant; *second,* whether, by reason of non-compliance with section 92 of the Municipal Court Code, defendant can question the authenticity of the signature attached to said contract.

Defendant introduced in evidence a by-law of the defendant company which provides that no debts shall be contracted or liability incurred or contracts made and entered into by any officer of the company unless authorized and directed by a resolution of the board of directors entered in the minutes of said board, and that all contracts involving a payment or a liability greater than twenty-five dollars shall be reduced to writing and signed by the president and secretary and

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be under the seal of the company; and evidence was introduced showing no such resolution was ever adopted authorizing the making of the contract.

There is evidence which might be deemed sufficient to establish general authority in Hillman, the secretary and director, to fix the terms of all contracts for the distribution of defendant's publications, so as to bring the making of the contract with plaintiff within the apparent scope of his authority, notwithstanding the provisions of defendant's by-laws; but there is no proof of knowledge by plaintiff of such general authority in Hillman and plaintiff's reliance thereon. Nor is there sufficient proof of ratification, except as shown by the pleadings.

It is also contended by plaintiff-appellant, and we think properly, that the question of the authenticity of defendant's signature to the contract could not be raised by defendant on the trial herein because of defendant's failure to comply with section 92 of the Municipal Court Code, which provides that "A signature to a written instrument which is pleaded shall be taken as admitted unless the party sought to be charged thereby files with the clerk, within eight days after joinder of issue, a specific denial of the genuineness of the signature and a demand that it be proved. Such denial and demand by a defendant may be included in his answer." While the answer herein denies the making of the contract alleged in the complaint, it does not demand that the signature to the contract, which is pleaded and annexed to the complaint herein, be proved, as required by section 92. The party sought to be charged with said contract is the defendant herein, not Hillman, and the contract alleged purports to bear the signature of the defendant.

Defendant having failed to comply with the provisions of section 92, its signature to said alleged con-

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tract must, for the purpose of the trial of this action, be deemed the genuine and authentic signature of the defendant.

Plaintiff proved the making of a valid contract, binding upon the defendant, and a subsequent breach thereof, with damage to plaintiff. This established a good cause of action, and the dismissal of the complaint was error.

The judgment must, therefore, be reversed and a new trial ordered, with thirty dollars costs to appellant to abide the event.

BIJUR, J., concurring in result.

Judgment reversed and new trial ordered, with thirty dollars costs to appellant to abide event.

ANNIE FISICK, Appellant, *v.* HERMAN LORBER, Respondent.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Automobiles — master and servant — negligence — evidence — negligence of chauffeur.

That a chauffeur by permission of his employer stops at his own home for supper on the way to the garage with the car does not remove him even temporarily from his employment.

Where the chauffeur while taking the car back to the garage in Williamsburgh went by way of Broome street rather than by Delancey street, the distance between the two streets covering but a short city block, his act constituted a negligible deviation from the direct route but was without effect to suspend the course of his service to his master.

Where, in an action against a physician for personal injuries caused by his automobile driven by his chauffeur, there was no evidence that he, after he had by permission of his master

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taken his supper at his own home, was engaged in other than his master's service in returning the automobile to the garage accompanied by his wife and mother-in-law, a charge to the jury, that if instead of turning to go toward Delancey street he started south toward Broome street the jury might infer that he was not proceeding by the nearest way to the garage for the purpose of storing the car and that if he was taking his wife and mother-in-law either for a drive or to visit some persons or to entertain them in any way he was not then employed in the business of defendant and defendant was not answerable for his negligence, is erroneous.

APPEAL by plaintiff from a judgment of the City Court of the city of New York, in favor of defendant, entered upon the verdict of a jury.

Morris & Samuel Meyers (Samuel Meyers and George Wolf, of counsel), for appellant.

William Butler (R. Waldo MacKewan, of counsel), for respondent.

BIJUR, J. Plaintiff claims that while she was sitting on the sidewalk in front of No. 33 Cannon street about ten o'clock of a summer evening, defendant's automobile, in charge of his chauffeur, Soble, was so negligently operated that the rear end of it came up on the sidewalk and injured her. Defendant is a doctor living at 330 East Fourth street. Soble had finished his work for the day and was to take the automobile to the garage in Williamsburg over the so-called Delancey street or Williamsburg bridge. He went to his own home at No. 29 Cannon street to get his supper. No. 29 Cannon street is about halfway between Delancey street and Broome street, which is south of Delancey.

Plaintiff's contention, in substance, is that after

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Soble had finished his supper, he started for the garage taking his wife and mother-in-law along for the ride. The machine was then standing in front of his house on the west side of Cannon street facing Broome, with its back toward Delancey. For some reason Soble backed the machine and struck the plaintiff with the rear wheels. It is a question whether then Soble went off toward Broome or Delancey streets.

Defendant's claim is that plaintiff was sitting in the gutter on a chair.

The question whether Soble had his master's permission to stop at his own home for dinner was litigated at length. Although mere permission would not be determinative (see *Cunningham* v. *Castle,* 127 App. Div. 580, 586, 587) nevertheless if he had such permission it is evident that his stop for the meal while engaged in his master's service in returning the automobile to the garage did not remove him even temporarily from that service.

In this respect the learned judge below charged the jury incorrectly when he said: "If the owner told him 'You can take my automobile and go to your home and get your dinner' and he proceeded to do so and he hurt somebody while doing so, he would not be engaged at that time in the business of the defendant." This error in the charge, however, except in so far as it may have conveyed to the jury a generally inaccurate impression as to the law of the case, was probably not material because whether at the actual time when Soble was taking his dinner he was engaged in his master's service or not, it is perfectly clear that after he had finished the meal if he started for the garage he had completely resumed his master's duties. *Geraty* v. *National Ice Co.,* 16 App. Div. 174; *Jones* v. *Weigand,* 134 id. 644.

Bearing in mind the fact that the distance between

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Delancey and Broome streets covers but a short city block, it is perfectly apparent that if Soble was on his way to the garage in Williamsburg the mere fact that he went by way of Broome street, rather than by Delancey street, constituted a negligible deviation from the direct route. It had no effect to suspend the course of his service to his master. *Quinn* v. *Power*, 87 N. Y. 535; *Jones* v. *Weigand, supra; Geraty* v. *National Ice Co., supra.* The court apparently recognized the fact that the problem for the jury to solve began when Soble resumed the conduct of the automobile after his meal. He said to the jury; "The question will be presented whether or not, after he had finished his meal at his home in Cannon street, he was proceeding to the garage directly for the purpose of storing the car for the night, or was he about to take his family to visit somebody, or for a ride. If he was proceeding directly to the garage, then he was employed in the business of the defendant, but if he was taking his wife and mother-in-law to visit somebody, or for a ride, then he was engaged in his own business, and not the business of the defendant, and there can be no liability fastened upon the defendant by reason of the fact that the chauffeur was using the defendant's car for his own entertainment or purposes."

Later he said: "We do know that had he gone to the garage directly after being discharged for the night at the defendant's place of business, it would have been the nearest way to go over the Delancey street bridge, because the garage was near the Brooklyn end of that bridge. Having passed south of Delancey street to go to his home, if he desired to go to that garage by the nearest route presenting itself, he would naturally turn his car north again, to go to Delancey street and cross the bridge."

And then added: "But if instead of turning toward

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Delancey street * * * he started south toward Broome street, you may very well infer from that fact that he was not proceeding in the nearest and direct way to his garage for the purpose of storing the car for the night, and if he was taking his mother-in-law and his wife south, either for a drive or to visit some persons or to entertain them in any way, he was not then employed in the business of the defendant, and the defendant is not answerable for his negligence."

Plaintiff's counsel excepted to this portion of the charge, and particularly to the right accorded to the jury to draw "a certain inference from the way the automobile was driven off or the direction in which the automobile was driven off." This exception presents error for which the judgment must be reversed.

There was no direct evidence to contradict the chauffeur's statement, when testifying on behalf of *defendant* that he was proceeding to the garage, and that his wife and mother-in-law accompanied him only because they were going to Williamsburg and he "would drop them off after he took them across the bridge," that that was what he did. There was, therefore, no evidence at all that after he had taken his meal he was engaged in other than his master's service returning the automobile to the garage. As I have pointed out above, the mere fact that he went by way of Broome street rather than Delancey street for a short distance would amount merely to a deviation from the direct route.

I cannot find in this fact even the proverbial "scintilla" of evidence that he was entering upon a joy-ride or any purpose of his own, but even such a scintilla furnishes no adequate foundation upon which to base a finding. *Matter of Case,* 214 N. Y. 199, 203, 204 and cases there cited.

The record as it comes to us presented no issue as

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to the defendant's responsibility, it being uncontradicted by direct testimony or circumstance that at the time of the accident Soble was engaged in his master's service. The only question was whether the accident was the result of Soble's negligence.

In connection with this subject, appellant claims that the court below committed further error by charging, in substance, that if the plaintiff was not seated on the sidewalk that was the end of the case. Appellant would have us infer from this that the court below had charged that appellant's sitting in the gutter was contributory negligence as matter of law. It is quite plain to me, however, from a reading of the context, that what the court did charge was that if plaintiff was not sitting on the sidewalk then she could not recover, because then her whole theory of the case failed. This had no reference to the question of contributory negligence.

GUY and PHILBIN, JJ., concur.

Judgment reversed and new trial granted, with costs to appellant to abide event.

ROSS R. SIGSBEE, Respondent *v.* NEW ERA MANUFACTURING COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Contracts — covenants of — breach of — failure to fix terms for continuance of agreement — actions — when unenforcible — appeal.

Plaintiff was employed by defendant to go to a certain territory and there hire salesmen, put them out to sell goods and as soon as a check writer got there they were to sell check writers. The check writer was to be there about the first of

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February and plaintiff's commission was to be fifty per cent, and forty per cent was to be paid to the salesman. Held, that in the absence of any covenant on plaintiff's part either to purchase a definite number of the articles to be supplied defendant or to continue his services for any definite period acquiesced in by defendant there was no enforcible contract.

The failure of the parties to fix any terms for the continuance of the agreement left it as one terminable at will.

In an action for breach of the alleged contract defendant on motion to dismiss the complaint on the ground that the contract was too indefinite and uncertain might urge the absence of a specified term for its continuance.

Even if on defendant's motion to dismiss the complaint the points that the contract was unenforcible because of the absence of a covenant on plaintiff's part to purchase a definite number of articles from defendant or to continue in its employ for a definite period were not separately and clearly urged, defendant was entitled to avail itself of them on appeal from a judgment in favor of plaintiff since the objections were not to a defect in formal proof but that plaintiff had failed to establish a cause of action.

APPEAL by defendant from a judgment in favor of plaintiff, entered upon the verdict of a jury in the City Court of the city of New York.

Frederic C. Leubuscher, for appellant.

Hacker & Bowman (William L. Bowman, of counsel), for respondent.

BIJUR, J. This action was brought for breach of a contract of employment.

When asked on cross-examination to state "What the contract was that you made with this defendant company," the plaintiff answered "The contract was I was to go to the southern district of Georgia, which was outlined on this map, and take charge of that

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property and the development of it; I was to go down there and hire salesmen, put those salesmen out to sell protectors and pencil sharpeners, and as soon as a check *writer* got there they were to sell check writers. The check *writer* was to be there about the first of February. The instructions were also as to what the commissions were to be, and so forth, 50 per cent. commission to myself, 40 per cent. to the salesmen, so it left me 10 per cent. difference between the salesmen and myself."

I am unable to find in this statement any contract between plaintiff and defendant. Defendant urges that there was no agreement on its part to furnish the plaintiff with check writers for sale, and second that the price of the writer to the public was not specified. I think, however, that if the testimony of the plaintiff be believed, as it no doubt was, by the jury, there was ample evidence to sustain a finding that the defendant had agreed to supply check writers by a certain date which was repeatedly postponed, and that the price to the public was plainly indicated as twenty dollars.

The element that I regard as fatal to plaintiff's recovery is the absence of any covenant on his part either to purchase a definite number of the articles to be supplied by the defendant (*Rafolovitz* v. *American Tobacco Co.*, 73 Hun, 87; *Jackson* v. *Alpha Portland Cement Co.*, 122 App. Div. 345) or to continue his services for any definite period acquiesced in by the defendant. These elements cannot be supplied by the implication of a covenant to perform services as was done in *Moran* v. *Standard Oil Co.*, 211 N. Y. 187 and *Grossman* v. *Schenker*, 206 id. 466.

In any view, the failure of the parties to fix any term for the continuance of the agreement left it, if there were any agreement at all, as one terminable at will. In reaching this conclusion I may say that I do not

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confine myself merely to the language of the testimony in the extract which I have quoted, but have taken into consideration all the evidence given by plaintiff as to the terms of his so-called employment. Although the absence of a specified term for the continuance of the contract does not appear to have been urged in so many words, on defendant's motion to dismiss the complaint, nevertheless, defendant stated as its first ground that "the contract is too indefinite and uncertain," which I think sufficiently indicates both objections to which I have referred, although defendant apparently laid more stress on the absence of proof upon which any definite measure of damages could be predicated. Even if, however, the precise points were not separately and clearly urged, defendant may avail of them on this appeal since the objection is not as to a defect in formal proof (*Ramsay* v. *Miller*, 202 N. Y. 72), but that "no cause of action has been established by the plaintiff." *Shotwell* v. *Dixon*, 163 N. Y. 43; *Miller* v. *Barnett*, 158 App. Div. 862, 868, 869.

GUY and PHILBIN, JJ., concur.

Judgment reversed with costs and complaint dismissed, with costs of action.

ELLEN RUSSELL, Respondent *v.* CHARLES B. KEMP, Appellant.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Automobiles — driving in violation of traffic ordinance — contributory negligence — damages.

The act of the driver of plaintiff's automobile, who while driving twenty-five feet from the right hand curb in violation of a traffic ordinance twice gave a stop signal but stopped

formal proof could not be availed of on appeal.

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only after the second one, constitutes such contributory negligence as precludes a recovery for damages by defendant's automobile running into the rear of plaintiff's car.

APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, in favor of plaintiff, involving also the dismissal of defendant's counterclaim, after a trial by the judge without a jury.

Frederick R. Graves, for appellant.

Wentworth, Lowenstein & Stern (Louis Lowenstein, of counsel) for respondent.

BIJUR, J. Plaintiff's automobile, in charge of her son, was proceeding down the Ocean boulevard in Brooklyn running south and approaching Eighteenth street, which cross the boulevard at right angles. The car was running along about twenty-five feet from the right hand curb. The son, who was plaintiff's only witness to the accident, testified that at a point about one hundred feet north of Eighteenth street he put up his hand (which is the signal that he was going to stop). He then turned around and saw defendant's automobile about one hundred and fifty feet beyond and about one hundred and twenty feet from the curb, proceeding in the same direction, namely, to the south. When he reached the intersection of Eighteenth street, he put up his hand again, and then says that he turned around and saw defendant's automobile running along on the same line about fifteen feet behind him. He then stopped and defendant's automobile ran into the rear of plaintiff's car.

It is perfectly manifest on this record that plaintiff's son was guilty of contributory negligence. Not

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only did he violate every one of the traffic ordinances applicable to his case (except as to the rate of speed) but his course was so irrational that it is difficult to understand what plaintiff can claim defendant should have done under the circumstances. Plaintiff's son testified that he had intended to turn west into Eighteenth street. Why he twice gave a stop signal if he intended to turn is incomprehensible. If he intended merely to stop, he violated the ordinance which required him to do so at the curb. He also violated the ordinance which required him to keep as near the right hand curb as possible while running along the road. This, however, under the circumstances, and at the rate of speed at which he was proceeding, was probably immaterial. More particularly, however, he violated the ordinance which requires that in turning under these circumstances he should keep as near as possible to the right hand curb.

I am of opinion that upon the facts conceded or claimed by the plaintiff the son was plainly guilty of contributory negligence and that no negligence can be predicated on the part of the defendant because in view of plaintiff's irrational course he could formulate no sound plan for the safety either of his own or of the plaintiff's car.

GUY and PHILBIN, JJ., concur.

Judgment reversed and new trial granted, with thirty dollars costs to appellant to abide event.

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WILLIAM H. GRANBERY, Respondent, *v.* GEORGE C. TAYLOR, as president of American Express Company, an unincorporated association composed of more than seven members, Appellant.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Carriers — of merchandise — express companies — tariff rates — value of package — appeal.

An express company, upon receiving a package in Brooklyn for transportation to a point in Central Park west, issued a receipt therefor containing no express limitation upon the carrier's liability but reciting that the package was received "subject to the classifications and tariffs in effect on the date hereof." The tariff duly filed by the express company provided that the rates governed by the classification of valuation charges were based upon a value of not exceeding fifty dollars on each shipment of 100 pounds etc. and that the liability of the company was limited to the value as given unless a greater value was declared at the time of shipment. Held, that in the absence of such declaration by the shipper his recovery for the loss of the package was limited to fifty dollars.

The tariff rates of the express company did not give it an option to inquire as to the value of the package and to fix its rate and liability accordingly, nor did it import a waiver if no such inquiry were made.

Where the objection that defendant did not prove that its tariff had been filed under all attendant technical requirements was not made at the trial, nor the matter called to the attention of the court or of the defendant, the defect in merely formal proof could not be availed of on appeal.

APPEAL by defendant from judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, for $360.65, in favor of plaintiff after a trial by a judge without a jury.

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Carter, Ledyard & Milburn (Milton C. Lightner, of counsel), for appellant.

Putney, Twombly & Putney (Walter H. Griffin, of counsel), for respondent.

BIJUR, J. This case has many points of similarity with *Lichterman* v. *Barrett, post,* 594, decided simultaneously herewith.

Plaintiff delivered to defendant at a house in Brooklyn in this city a trunk and a package to be transported to another point in this city at Central Park west. The trunk was delivered, but the package lost. It is conceded that at the time of delivery to the carrier no valuation of the shipment was declared by the shipper or requested by the carrier.

The only question involved is in regard to the limitation of defendant's liability to the amount of fifty dollars. As a matter of practical interest, it appears that the form of receipt formerly used by the defendant prior to the Cummins Amendment to the Interstate Commerce Law has recently been changed, probably to conform to the requirements of the Cummins Amendment approved March 4, 1915, so that the same receipt may be used for interstate and intrastate shipments interchangeably. The present form of receipt contains no express limitation upon the carrier's liability. A note on its face refers to a requirement that the value of the article shipped must be declared under certain circumstances, but there is no provision indicating that the carrier's liability shall be varied according to the value of the contents. On the face of the receipt, however, it is recited that the article is received "subject to the classifications and tariffs in effect on the date hereof."

Whatever doubt may have been heretofore entertained regarding the binding character of these tariffs

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when duly filed as constructive notice to the carrier has been removed as to interstate shipment by *Boston & Maine R. R. Co.* v. *Hooker*, 233 U. S. 97; *Barstow* v. *N. Y. N. H. & H. R. R. Co.*, 158 App. Div. 665, and as to intrastate shipments, referring to tariffs filed with the public service commission in this state, by *Gardiner* v. *N. Y. C. & H. R. R. R. Co.*, 201 N. Y. 387; *Lewis* v. *N. Y., O. W. R. R. Co.*, 210 id. 429, 432. The appropriate tariff duly filed by the defendant provides:

"Rule 13: Valuation Charges: (a) The rates governed by this classification are based upon a value of not exceeding $50.00 on each shipment of 100 lbs. or less, and not exceeding 50 cents per pound, actual weight, on each shipment weighing more than 100 lbs., *and the liability of the express company is limited to the value above stated unless a greater value is declared at time of shipment*, and the declared value in excess of the value above specified is paid for, or agreed to be paid for, under the schedules of charges for excess value."

I think that both by way of contract (*Belger* v. *Dinsmore*, 51 N. Y. 156; see also cases cited in *Litcherman Case, supra*), and by reason of the binding character of the tariff itself, the plaintiff was bound by, and the defendant entitled to the benefit of, the limitation of its liability to fifty dollars, dependent upon the valuation or rather absence of valuation, by the shipper of the package. It is conceded that such limitation coincident with a fixing of rates dependent upon the value of the goods shipped, placed at the option of the shipper, is a valid regulation. *Hart* v. *P. R. R. Co.*, 112 U. S. 331.

The only question that has occurred to me has been whether the provision of defendant's tariff is to be construed as awarding to it an option to inquire as to the value of the package and to fix its rate and liability

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accordingly, and as importing a waiver if no such inquiry is made. *Meister* v. *Woolverton*, 140 App. Div. 926, approved in *Robinson* v. *N. Y. C. & H. R. R. R. Co.*, 145 App. Div. 391, affd. on the opinion of Miller, J., 203 N. Y. 627. I think, however, that the language of section 38 of the Public Service Commission Law so construed in those cases differs materially from the provision of defendant's tariff in the instant case, and that the doctrine of waiver there applied is not applicable here.

Respondent urges that the defendant did not prove that its tariff had been filed under all attendant technical requirements. No such objection was made in the court below, nor was the matter called either to defendant's or the court's attention directly or indirectly. Under such circumstances, the defect in merely formal proof cannot be availed of here. *Ramsay* v. *Miller*, 202 N. Y. 72.

The judgment must, therefore, be reduced to $50, with appropriate costs in the court below, and as so modified affirmed, with costs of this appeal to appellant.

GUY and PHILBIN, JJ., concur.

Judgment modified and as so modified affirmed, with costs.

ANNA C. ULRICH, Appellant, *v.* INTERBOROUGH RAPID TRANSIT COMPANY, Respondent.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Negligence — action to recover for personal injuries — evidence — trial — pleading.

Where, in an action to recover for personal injuries sustained on a waiting platform at a railway station, the negligence of defendant is well pleaded, an allegation of the

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complaint that the platform was taxed beyond its capacity need not be proved; such allegation does not detract from the other negligence amply pleaded.

Where there was evidence of continued undue pushing and crowding at certain points and of lack of provision for moderating or controlling it at the place where plaintiff was injured, it is error not to submit the case to the jury.

APPEAL by plaintiff from a judgment of the Municipal Court of the city of New York, borough of Manhattan, eighth district, dismissing the plaintiff's complaint.

Moss, Marcus & Wels (Isidor Wels, of counsel), for appellant.

James L. Quackenbush (Walter Henry Wood, of counsel), for respondent.

BIJUR, J. Plaintiff sues to recover damages for personal injuries sustained by her on the platform of the City Hall station of the defendant company.

After the first trial of this case, the judgment was reversed by this court (157 N. Y. Supp. 753) for the reason that the trial court submitted to the jury the question whether the injuries were caused by the overcrowded condition of the platform, of which there was no proof, this court saying: "The case should have been submitted to the jury upon the question as to whether the defendant made provision for moderating undue crowding and whether there was any negligent failure on the part of the platform men to discharge their duty."

On this trial plaintiff amended its complaint to meet this opinion so that it stated defendant's negligence as follows: "That the crowds upon the said platform at such times were very large, and the platform was taxed to its capacity; that the pushing and crowding of pas-

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sengers by other passengers and persons on said platform at such hours was a matter of common occurrence, and said defendant, notwithstanding the said condition at the time mentioned in this complaint and prior thereto, failed to provide an adequate force of persons, and failed to take effective measures to protect passengers from being pushed and crowded by other passengers."

Respondent still clings to the contention that it is necessary for plaintiff to show that the platform itself was overcrowded, basing this upon the language of the pleading: "The said platform was taxed beyond its capacity." That phrase, however, does not detract from the other negligence amply pleaded.

Plaintiff's testimony discloses that the crowds on the platform at the six o'clock hour were very large and that they congregated in large groups at the gates of defendant's trains. There is ample testimony on her part from which the jury might find that there were no guards at or near the crowd of which she was one, and that there was nobody there regulating the crowd or giving them instructions how to move. We, therefore, have a case where there was evidence of continued undue pushing and crowding at certain points and of lack of provision for moderating or controlling it, and it was error on the part of the court not to submit it to the jury. *Bacon* v. *Hudson & Man. R. R. Co.*, 154 App. Div. 742; *Reschke* v. *S. L. S. & N. R. Co.*, 155 id. 48, affd. 211 N. Y. 602.

The judgment must be reversed and new trial ordered, with thirty dollars costs to appellant to abide the event.

GUY and PHILBIN, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

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MARY FREEMAN, Appellant, v. SAMUEL HYMAN, Respondent.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Trial — in action to recover for loss of services — infants — automobiles — submission to jury — new trial.

Where in an action to recover for loss of services of an infant injured by defendant's automobile the testimony of the chauffeur that he was using the car on his own business is uncontradicted, the presumption of liability arising from ownership of the car requires that the case should be submitted to the jury.

Where a trial judge on his erroneous conclusion that he should have directed in favor of defendant as matter of law grants a new trial the order therefor will not be disturbed where an examination of the record discloses that the result reached was just.

APPEAL by plaintiff from an order of the Municipal Court of the city of New York, borough of Manhattan, fourth district, setting aside a verdict of a jury for fifty dollars in favor of plaintiff.

Mordecai P. Springer, for appellant.

Julian S. Eaton (Martin B. Faris, of counsel), for respondent.

BIJUR, J. Plaintiff sued for the loss of services of her infant child owing to his being injured by defendant's automobile.

The sole testimony as to the control of the automobile was that of defendant's witness, his chauffeur. It appears that while the machine was owned by the defendant, his occasional chauffeur was a garage

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keeper, who frequently drove him mornings and evenings, but not afternoons. On this afternoon, as the chauffeur testified, he had express permission to drive the car on his own business and was doing his own errands around town in it when the accident happened.

The order setting aside the verdict recites: "Judgment set aside upon defendant's exception to refusal of motion to direct verdict for defendant, as I have concluded such direction should have been given as a matter of law. *Reilly* v. *Connable,* 214 N. Y. 586."

The learned judge below had, at the request of the plaintiff, charged the jury, without exception from defendant's counsel, that they might draw an unfavorable inference from defendant's failure to testify at all. There was thus present in this case not only the presumption arising from the ownership of the automobile, which in *Ferris* v. *Sterling,* 214 N. Y. 249, 253, was held to be sufficient to require submission of the issue of control to the jury, but there was the additional consideration of defendant's total absence. The testimony of the chauffeur, moreover, was merely in the most general terms: "I had to go to Flushing on some business of myself." In *Reilly* v. *Connable,* 214 N. Y. 586, relied on by the court below, it is quite evident that the decision is based on the consideration of the legal effect of the testimony of the defendant's witnesses alone, the same having been accepted as the true version of the accident, and no point was made of the weight to be attached to the presumption of ownership. There is nothing in that case to weaken the application of the rule firmly established in the *Ferris* case.

The learned judge below, therefore, was in error in concluding that he should have directed a verdict in favor of defendant as matter of law. Although, therefore, the reason for setting aside the verdict was incorrect, we must, nevertheless, examine the record to

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ascertain whether the result reached was not just (*Ross* v. *Metropolitan St. R. Co.*, 104 App. Div. 378), for, if it was, the order must, nevertheless, be affirmed.

Defendant moved to dismiss the complaint at the close of plaintiff's case and renewed the motion at the conclusion of the entire case, and took due exception to the refusal. The ground alleged was that plaintiff had failed to prove any negligence. The motion should have been granted.

Plaintiff's son testified that he looked both ways before he crossed the street and saw no automobile; that he kept on looking and there was nothing in sight for several blocks. "I stepped down from the curb and kept looking up and down and was just going to step on the opposite curb when I was struck." "Q. Where were you knocked to? A. I cannot tell you. Q. You do not remember anything after that? A. Only When the policeman put me in the automobile." A companion, another boy, testified to the same effect, and added that he did not see defendant's automobile until after the accident about half a block away. Defendant's chauffeur was asked: "Q. Did you see these boys in front of you in the street? A. No, sir, not in front of me. * * * Q. Did you strike this boy with the front part of your car? A. I did not know that he was hit until I heard this woman hollering and telling me to stop"—at which he stopped at once and went back.

There is in all this not the slightest suggestion as to the manner in which the accident happened, and certainly no foundation for claiming that the defendant's chauffeur was guilty of negligence. Indeed, the plaintiff's brief does not even now point out in what respect it is claimed that the chauffeur was negligent.

Were it possible in the state of the record to dismiss the complaint, we should do so, but, as the record

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stands, the order setting aside the verdict and granting a new trial is affirmed, with twenty-five dollars costs to the respondent to abide the event.

GUY and PHILBIN, JJ., concur.

Order affirmed, with costs.

BELLE LICHTERMAN, Respondent, *v.* WILLIAM M. BARRETT, as President of THE ADAMS EXPRESS COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Carriers — common — when acceptance of receipt does not establish contract — actions.

A common carrier may properly contract to restrict its liability by appropriate provision covering the due valuation of goods accepted for transportation and the presentation by the carrier and acceptance by the shipper of a receipt containing in appropriate type and language the expression of such limitation establishes a contract between the parties regardless of whether the shipper chooses to read it or not.

Where a receipt for baggage is given by a carrier to a person actually traveling under circumstances which do not warrant the presumption that he will read the same, but rather implies that he accepts it as a mere voucher or token for the article delivered to the carrier, the mere acceptation of such a receipt does not establish a contract.

Where in an action against a carrier for delay in delivering a trunk plaintiff to prove delivery puts in evidence the receipt issued by defendant, the receipt is in the case for all legitimate purposes.

Guy, J. dissents.

APPEAL by defendant from a judgment for $228 in the Municipal Court of the city of New York, borough

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of Manhattan, first district, in favor of plaintiff, after trial by a judge without a jury.

Edward V. Conwell (George W. Smyth, of counsel), for appellant.

Feiner & Maass (David R. Bernstein, of counsel), for respondent.

BIJUR, J. The plaintiff delivered for transportation within this state a trunk which was called for at her home in this city and directed to Roscoe, N. Y., where plaintiff was about to go. Through a delay of over two months in delivery, plaintiff pleaded, and I think sufficiently proved, the amount of damage to the trunk and its contents for which the judgment was awarded, thus eliminating in substance the errors for which a previous judgment in her favor was reversed. 157 N. Y. Supp. 882. No value of the trunk was declared by the shipper.

The only question on this appeal is as to the effect of the receipt given by defendant's driver, upon which was printed in large type "Company will pay not over $50 in case of loss or 50 cents per pound on shipments in excess of one hundred pounds unless greater value is declared and higher rates paid." A detailed clause elaborating this provision is printed in smaller type on the lower half of the receipt. Plaintiff did not read the receipt. Since the decision in *Blossom* v. *Dodd*, 43 N. Y. 264, examined in *Belger* v. *Dinsmore*, 51 id. 166, and followed by a long line of cases to the same effect, it is well settled in this state that a carrier may properly contract to restrict his liability by appropriate provision covering the due valuation of goods accepted for transportation, and that the presentation by the carrier and acceptance by the shipper of a

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receipt containing in appropriate type and language the expression of such limitation establishes a contract between the parties regardless of whether the shipper chooses to read it or not. *Braus* v. *Manhattan Delivery Co.*, 78 Misc. Rep. 371; *Schwartz* v. *Fargo*, 145 App. Div. 574.

A careful distinction has been drawn, however, between such cases and those in which a receipt is given to a person actually traveling under circumstances which do not warrant the presumption that he will read the same, but imply rather that he accepts it as a mere voucher or token for the article delivered to the carrier. *Mills* v. *Weir*, 82 App. Div. 396; *Madan* v. *Sherard*, 73 N. Y. 329; *Grossman* v. *Dood*, 63 Hun, 324; affd. on opinion below, 137 N. Y. 599. See also *Zimmer* v. *N. Y. C. & H. R. R. R. Co.*, 137 N. Y. 460; *Healy* v. *N. Y. C. & H. R. R. R. Co.*, 153 App. Div. 516, affd., 210 N. Y. 646.

It seems to me to be plain that in the case at bar the plaintiff was not a traveler in the sense or under the circumstances intended by the last cited cases, and that she must be held to have assented to the contract tendered by the defendant.

She urges, among other contentions, that the receipt is not in evidence for general purposes. This claim arises out of a colloquy between the court and both counsel in which defendant's counsel remarked: "I don't want to be understood as conceding anything unless the receipt is put in evidence. * * * Plaintiff's counsel: I will put this receipt in only for the purpose of showing delivery of the trunk to defendant and for no other purpose. The Court: Mark it in evidence. Defendant's counsel: If it is received in evidence, Your Honor will not restrict its probative force." While no doubt evidence may be limited to a particular purpose in an appropriate case (*Deutsch-*

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mann v. *Third Ave R. R. Co.*, 87 App. Div. 508) a party cannot insist on putting in evidence a written instrument and relying upon a part thereof only, while excluding from evidence other essential parts upon which the other party desires to rest. The receipt having been put in evidence by plaintiff to prove delivery of the trunk was in the case for all legitimate purposes. *Springer* v. *Westcott*, 78 Hun, 365; affd., 166 N. Y. 117; *Jonasson* v. *Weir*, 130 App. Div. 528; *Cohen* v. *Morris, European & American Ex. Co.*, 151 id. 672.

It follows, therefore, that the judgment must be modified by reducing the same to fifty dollars with appropriate costs and, as so modified, affirmed, without costs of this appeal.

PHILBIN, J., concurs.

GUY, J. (dissenting). I am unable to concur in the conclusion reached by my learned colleagues herein. The evidence in my judgment fails to show the making of an express contract between plaintiff and defendant as to a limitation of value, but merely proves the giving and taking of a receipt coincident with the delivery of the trunk by plaintiff's agent, her daughter, to defendant's agent, no opportunity being afforded plaintiff's agent to acquaint herself with the contents of the receipt given for the trunk.

In *Grossman* v. *Dodd*, 63 Hun, 324; affd., 137 N. Y. 599, it was held that the shipper was not bound by a similar provision in a receipt given by defendant's agent to plaintiff upon an open pier where there was full opportunity given to examine the contents of the receipt, the court holding that the evidence was insufficient to establish, either actually or presumptively, notice of the contents of the receipt and assent thereto.

In *Madan* v. *Sherard*, 73 N. Y. 329, it was held that

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a traveler having delivered his baggage to a local express company, and receiving a paper, which, from the circumstances of the transaction, he had a right to regard simply as a receipt or voucher, to enable him to follow and identify his property, and no notice was given to him that it embodied the terms of a special contract, or was intended to subserve any other purpose than as a voucher, he was not, as matter of law, bound by its terms.

I can see no distinction of principle between the case at bar and the two cases cited. It cannot be seriously contended that our appellate court in deciding the cases above cited intended, as intimated in the majority opinion herein, to create a special privileged class of persons known as travelers, who would be exempt from the provisions of a special contract into which they had entered, but rather to lay down the rule that, whether travelers or not, whether actually *en route,* or at the end of a journey, or on the point of starting upon a journey, or even not engaged in traveling, a person delivering personal property to another for shipment, and receiving a receipt or voucher therefor under circumstances which preclude presumption of knowledge of the contents of the receipt or assent thereto, is not bound by a special limitation of value clause inserted in the receipt by the carrier, without notice to the shipper.

In *Greenwald* v. *Barrett,* 199 N. Y. 170, the Court of Appeals, in the learned opinion written by Justice Bartlett, emphasizes very specifically the fact that the evidence therein showed that plaintiffs had had similar transactions with defendant during a course of years and had in their custody a book of blank receipts; that they made the entries in the blanks themselves and prepared the receipt for signature by the express com-

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pany's driver when he called to take the goods, and, therefore, "must be charged with a knowledge of its contents in the absence of any proof whatever that they were not acquainted therewith."

In *Madan* v. *Sherard, supra,* the court also held that the question whether, in a particular case, the party receiving a receipt accepted it with notice of its contents, or with notice that it contained the terms of a special contract, so as to require him to acquaint himself with its contents, or merely delivered a trunk, taking a receipt or voucher therefor, is one of evidence to be determined by the jury. In the case at bar there is no evidence making plaintiff chargeable with implied knowledge, but positive evidence that no opportunity was given to gain such knowledge. On this uncontradicted evidence the trial judge, acting as a jury, properly determined this question of fact in favor of plaintiff.

The judgment should be affirmed, with costs.

Judgment modified and, as so modified, affirmed, without costs.

EMIL STAMP, Appellant, *v.* EIGHTY-SIXTH STREET AMUSEMENT COMPANY, Respondent.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Animals — escape of trained lions — negligence — liability of proprietor of theatre for injuries to spectator.

Where during a performance by trained lions in a theatre one of them escapes and enters the office, the proprietor of the theatre is liable to a spectator who in the resultant rush to escape from the theatre was injured, though he was not the owner of the animal.

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APPEAL by the plaintiff from a judgment of the Municipal Court of the city of New York, borough of Manhattan, sixth district, in favor of the defendant, dismissing the complaint on motion of defendant's attorney at the close of his case.

Henry G. Wenzel, Jr., for appellant.

William Butler (R. Waldo MacKewan, of counsel), for respondent.

LEHMAN, J. It appears undisputed that on December 17, 1914, the plaintiff's wife was a spectator at a vaudeville performance in the defendant's theatre and had paid an admission fee to see the performance. Among the acts on the program was a performance by trained lions. These lions did not belong to the defendant and the defendant did not have direct charge of the lions. The defendant merely engaged the owner of the lions to give this part of the performance. After the lions had performed before the public and another act was in progress, three of the lions escaped from their cages and entered the orchestra. When the audience saw the lions they attempted to escape in panic and in the resultant rush the plaintiff's wife was injured. Upon these facts the learned trial justice dismissed the complaint on the ground that the defendant was not the owner of the lions, did not have charge of them and was guilty of no negligence.

It is well established that the owner of a vicious animal is liable for any injury done by such animal. "The gravamen of the action in such cases, is the keeping of the animal with knowledge of its propensities, and, if it does some mischief, negligence is not, strictly speaking, an element of the owner's liability. There is, perhaps a presumption *juris et de jure* of negligence,

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based upon the keeping, and in that sense only an action would rest upon negligence. *Card* v. *Case*, 5 C. B. Rep. 622. The liability of an owner is absolute, and he is bound to keep the animal secure, or he must suffer the penalty for his failure to do so, in making compensation for the mischief done." See *Molloy* v. *Starin*, 191 N. Y. 21, and cases there cited. There is no doubt that a lion is a wild animal presumed to be vicious and every one is presumed to have knowledge of its vicious propensities. There can, therefore, be no doubt that the owner of the lions which escaped would be liable for any injuries directly caused by the lion. The trial justice has, however, held that this liability does not extend to the owner of the theatre who did not own the lions nor care for them.

It has been frequently held that one who harbors a vicious animal is subject to the same liability as the owner of the animal but in practically all the cases where this rule has been announced the person who "harbored" the animal took direct charge and control of the animal. Inasmuch, however, as the gravamen of the action is the "keeping" of the animal with knowledge of its propensities, I think any third person shares in the owner's liability if by his acts he actually "keeps" the vicious animal himself, or if he takes part in the owner's keeping of it. To quote again from the case of *Molloy* v. *Starin, supra,* "This rule of liability * * * is predicated upon the wrongful and unjustifiable conduct of the owner in keeping an animal of a vicious and therefore dangerous nature. If it is not securely confined, it is plainly a public nuisance, and security must be assured under all circumstances." Applying these rules to the case before us, I think it is evident that the keeping of the lions insecurely confined constituted a public nuisance. The defendant was responsible in the first instance for the keeping of

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the animals on its premises. It had itself procured the act and invited the public to the theatre to see it and unless security was assured it took part in the maintenance of a public nuisance. Just as the owner could not under these circumstances relieve himself of liability by proof of due care in the securing of the animals, so the defendant cannot relieve itself of liability by showing that a third party owned and had the actual physical care of the animals. The defendant's wrong consists in the bringing and keeping of vicious animals on its premises. The manner in which they were kept there is immaterial since the event shows that they were not securely confined.

The learned trial justice, however, relied on the same case of *Molloy* v. *Starin, supra,* from which I have quoted, as authority for the view that the defendant in this case is not responsible, in the absence of negligence, for injuries suffered by the plaintiff's wife. In that case it is true that the Court of Appeals by a divided court held that a common carrier which transported wild animals was not responsible, in the absence of negligence, for injuries caused by the animals. The decision in that case seems to be based on its own peculiar facts. The carrier had a lawful right, even if it was not legally bound, to transport wild animals in secure cages. In performing its functions as a common carrier it cannot be said to be "keeping" the wild animals in any fair sense, and it would be against public policy to extend the rule of liability to cover a case not within its reason. In this case, however, the defendant took upon itself the responsibility of bringing the wild animals on its own premises for its own purposes and then inviting the general public to visit the premises. The defendant is, therefore, within the letter and spirit of the rule which fixes upon one

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who harbors a wild animal an absolute liability for injuries suffered as a direct result of his own acts.

It is also urged that since the plaintiff's wife was injured by the panic-stricken crowd and not by the lions directly, the injuries were not in a legal sense caused by the lions. The panic of the crowd was, however, directly caused by the natural fear of an unsecured vicious animal and was a result which might well have been foreseen by the defendant.

It follows that the judgment should be reversed and a new trial ordered, with thirty dollars costs to appellant to abide the event.

PENDLETON and WHITAKER, JJ., concur.

Judgment reversed and new trial ordered, with thirty dollars costs to appellant to abide event.

SARAH E. COE, Appellant, *v.* ELIZABETH K. HAIGHT, Respondent.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Conversion — evidence held not to sustain counterclaim for storage. Landlord and tenant — boarding-house keeper's lien — action for rent — surrender and acceptance.

Evidence in an action for the conversion of a piano that when defendant, a boarding-house keeper, refused to deliver it to plaintiff on demand no claim was made for storage but only for damages for plaintiff's failure to retain a room for a year does not establish a lien for storage pleaded as a counterclaim.

The language of the statute which gives a boarding-house keeper a lien for accomodations, board, lodging and extras furnished cannot be extended to cover future rent or damages under a yearly hiring of a room.

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It had itself procured the the theatre to see it and ook part in the main- as the owner could e himself of lia- ing of the ani- lf of liability d the actual 's wrong animals kept hey

Where defendant counterclaime the hiring of a room for a year at assumed on appeal from a judgment hiring was by the year.

Where it appears that plaintiff gave the k defendant who thereafter rented the room, such a surrender and acceptance from the date of the

Where the record on appeal does not show t defendant's acceptance of the surrender she could rent for the entire period of hiring, and the burden her to show the period for which she was entitled to re the rents.

APPEAL by the plaintiff from a judgment of the Municipal Court of the city of New York, borough of Manhattan, fifth district, entered in favor of the defendant after a trial before the court without a jury.

Foody & Dey (Bartholomew Foody, Jr., of counsel), for appellant.

Myron Sulzberger (Isidor Enselman, of counsel), for respondent.

LEHMAN, J. The plaintiff herein sues for the conversion of a piano. The answer contains a general denial; a defense that the defendant is detaining the piano by reason of a lien of thirty-three dollars for use and occupation by the plaintiff of part of defendant's premises where the defendant is a boarding and lodging-house keeper. The answer also contains a counterclaim for the sum of thirty-three dollars for this use and occupation and a further counterclaim of two hundred and twenty-four dollars, being the amount still unpaid for a room which the defendant claims that she leased to the plaintiff for the term of one year from the 1st day of October, 1914, at the weekly rental of eight dollars per week.

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At the trial the defendant admitted the plaintiff's title to the piano but claimed a lien thereon for a charge of thirty-three dollars for storage of the piano and a further lien for the unpaid rent of the room rented by the plaintiff. It appears from the evidence that the plaintiff about October 5, 1914, hired a room in defendant's boarding-house at eight dollars a week. The defendant claims that the plaintiff agreed to hire the room for a year; the plaintiff denies that she agreed to take the room for any definite period. On or about the 7th day of April, 1915, the plaintiff with the permission of the defendant brought to the boarding-house the piano which forms the subject of this action. The piano was not placed in the plaintiff's room but was left in the defendant's living room. The defendant claims that she allowed the piano to be placed in this room upon the plaintiff's agreement to "make it right" with her for the storage of the piano but the plaintiff denies such an agreement. On May 24, 1915, the plaintiff left the defendant's premises after giving two weeks' notice of her intention to leave and after paying room rent to that date at the rate of eight dollars per week. At that time the defendant claimed that the room was rented by the year and presented to the plaintiff a bill as follows:

"October 5, 1914 to May 24th, 1915, 33 weeks.
"Price by the Season per week $9.00..... $297 00
"Price paid as per agreement by the year at price per week $8.00..... 264 00

"Balance due ..... $33 00"

The plaintiff refused to pay this bill and the defendant retained the piano. It further appears that at the same time the plaintiff delivered the keys to the de-

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fendant and thereafter the defendant rented the room and received during the unexpired period of the alleged yearly lease the sum of fifty dollars and fifty cents rental for the room. Upon this testimony the trial justice gave judgment " in favor of the defendant and awarding her One hundred and one Dollars and fifty cents and costs — the value of defendant's lien and providing that in case the said sum is not paid by plaintiff, defendant is entitled to possession of said piano until said sum herein awarded is collected or otherwise paid." The amount for which the trial justice rendered judgment is apparently based upon a finding that the room occupied by the plaintiff was hired by the year and that the defendant is entitled to a lien on the piano for the unpaid portion of the rental of the room less the amount received by the defendant during the summer from other parties.

It is to be noted that the trial judge apparently did not find that the defendant is entitled to a lien for storage on the piano but only for the unpaid rental of the room. As a matter of fact, even if we assume that the plaintiff agreed to pay what was " right " for storage of the piano, yet the defendant utterly failed to establish a lien for storage. In the first place the defendant on May twenty-fourth, when she refused to deliver to the plaintiff her piano, did not make any claim for storage but only for damages for plaintiff's failure to retain the room for a year; in the second place the defendant failed at the trial to show the reasonable value of the storage of a piano in a boarding-house parlor. It follows of course that the judgment can be sustained only if the defendant on May twenty-fourth had a lien for the unpaid balance of rent of the room for the term for which it was hired. At that time, concededly, the plaintiff had paid the rent of the room up to the date of her departure. The claim of the

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defendant was really for future rent or for breach of contract to keep the room for a year. The statute, however, gives a lien only for accommodation, board, lodging and extra furnished. Its language cannot possibly be extended to cover future rent or damages under a yearly hiring. Inasmuch as the plaintiff on May twenty-fourth had paid for all accommodation, etc., furnished her at that time, the defendant had no lien on the piano.

Moreover, I do not find in the record any justification for the amount of the judgment. Assuming as we must on this appeal, that the hiring of the room was by the year, the defendant would *prima facie* be entitled to the rent at the rate of eight dollars per week for the unexpired period of nineteen weeks. The plaintiff however showed that she gave the keys to the defendant and that the defendant thereafter rented the room. Concededly these acts on the part of the defendant constituted a surrender and acceptance at least from the date of the rerenting. *Gray* v. *Kaufman Dairy & Ice Cream Co.*, 162 N. Y. 389.

The record does not show the date of the acceptance of the surrender but, inasmuch as the plaintiff has shown that the surrender was actually accepted at some time, the defendant cannot claim rent for the entire period and the burden is on her to show the period for which she is entitled to rent.

Judgment should therefore be reversed and a new trial ordered, with thirty dollars costs to appellant to abide the event.

WHITAKER, J., concurs. PENDLETON, J., concurs in result.

Judgment reversed and new trial ordered, with thirty dollars costs to appellant to abide event.

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SAMUEL CRAUSMAN, Appellant, v. GEORGE G. GRAHAM CONSTRUCTION COMPANY, Respondent.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Landlord and tenant — summary proceedings to terminate relation — damages for breach of covenant.

In the absence of an express agreement to the contrary a landlord cannot recover for damages which accrued by reduced rentals received after the lease had been terminated by summary proceedings.

A tenant's default in payment of rent for which he was dispossessed in summary proceedings cannot be regarded as being the cause of alleged decrease in rental value and is not an element of damage allowable to the landlord.

Where a lease recites a deposit of money as security for the faithful performance of all the terms, covenants and conditions of the lease to be allowed on all damages from any breach, the landlord is only entitled to have recourse to the security to the extent of any damages arising during the tenancy by reason of a breach of the covenants expressly covered by the security under the terms of the lease.

After summary proceedings to dispossess the tenant for breach of covenant the landlord may not recover moneys expended for repairs which the tenant was obligated to make under the lease, in the absence of proof that they were made necessary by any neglect of duty on the part of the tenant during the tenancy.

APPEAL from a judgment of the City Court of the city of New York entered upon a verdict in favor of the defendant, and from an order denying plaintiff's motion for a new trial.

Goldfein & Weltfisch (Joseph Goldfein, of counsel), for appellant.

Konta & Kirchwey (Karl W. Kirchwey, of counsel), for respondent.

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PHILBIN, J. The plaintiff sued to recover part of a sum of money deposited with the defendant as security upon the execution of a lease by the latter to the plaintiff's assignor. The lease was made for a term of four years and eleven months beginning on the 1st of June, 1915, at a rental of $14,000 per year, payable in semi-monthly installments of $583.33 each. It was terminated by summary proceedings on the 1st of November, 1915, when the defendant re-entered and resumed possession. The plaintiff claimed that, having fully complied with the terms of the lease, except as to the payment of the rent due at the time of the summary proceedings, which was agreed upon as being $583.33, he was entitled to the return of the balance of the deposit, amounting to $1,750 and interest. The defendant set up as a separate defense and in diminution and extinguishment of the plaintiff's claim, that it suffered damages because of depreciation in rental value and the expenditure of certain sums of money made necessary for expenses in the summary proceedings and repairs to the premises.

The damages, thus referred to, other than said disbursements, are more definitely stated by the defendant to be the difference between the rent payable under the lease and the rents collected by the defendant from tenants of the premises from the termination of the lease to the date of the bill of particulars; also the difference between the rental reserved under the lease and the reasonable rental value of said premises for which the defendant could rent the same before the expiration of the term fixed in the lease.

The clause in relation to the security so given declared that the lessee had deposited with the defendant the sum of $2,333.33 " as security for the faithful performance of all the terms, covenants and conditions of this lease, it being expressly understood and agreed

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that, if the tenant fails to perform any of the covenants and conditions thereof, then and in that event the said deposit of $2,333.33 shall be allowed on all damages sustained by the landlord by reason of such breach. If, however, all terms, covenants and conditions of this lease are fully complied with, then in that event, the said cash security shall be applied as the payment of the last two months' rent of the term of this lease * * *." There is nothing in the lease upon which there can be predicated a claim for damages arising after its termination by summary proceedings.

The court below, over the objection and exception of plaintiff's counsel, received testimony relating to the collection of rents after November 1, 1915, when the warrant was executed and to the rental value of the premises as of that day.

It is well settled that, in the absence of an express agreement to the contrary, there can be no recovery for damages that accrue after the termination of the lease by summary proceedings. Code Civ. Pro., § 2253; *Chaude* v. *Shepard,* 122 N. Y. 397; *Michaels* v. *Fishel,* 169 id. 381.

The respondent does not make a claim for damages accruing after summary proceedings, but insists that such evidence was admissible to show the damage suffered before the termination of the lease and upon the lessee's breach; that the evidence of net rental for the subsequent period was introduced to show the diminished rental value, as was also the testimony of the real estate expert.

It is further asserted that, at the moment the warrant in summary proceedings was issued, the defendant was damaged to the extent of the difference between the rent reserved and the actual rental proved upon the trial. Apart from the fact that the defendant instituted the proceedings by which the lease was

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ended, the default of the lessee cannot be regarded as being the cause of the alleged decrease in rental value. The lessor is only entitled to have recourse to the security to the extent of any damages arising during the tenancy by reason of a breach of the covenants expressly covered by the security under the terms of the lease. *Scott* v. *Montells*, 109 N. Y. 1. There is nothing in the lease that would make the present circumstances an exception to the rule so laid down.

In *Slater* v. *Von Chorus*, 120 App. Div. 16, cited by the defendant, the landlord was held entitled to recover for loss in rentals for certain months after the ending of the lease by summary proceedings because there was a stipulation in the lease justifying the court in holding that the lessee assumed liability for such damages. The recovery was not claimed on the theory of depreciation in rental value. That is not the fact here. The verdict of the jury in the case at bar was clearly based upon damages suffered after the summary proceedings. The court charged that the defendant was entitled, under a verdict in its favor, to the difference between the amount of the rent reserved in the lease and the actual rent obtained by the defendant after the dispossess proceedings, or the amount which the defendant could have obtained by reasonable effort to rent the premises. Similar instructions were repeated throughout the charge, to all of which the plaintiff's counsel duly excepted. The further claim made by the defendant for reimbursements, because of moneys expended for repairs that plaintiff was obligated to make under the lease, was not sustained by the proof, because it did not appear that the repairs were made necessary by any neglect of duty occurring during the tenancy.

There was also error committed in allowing evidence as to expenses incurred for counsel fees and like items

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upon the summary proceedings. The jury was authorized by the charge to allow for these disbursements. There can be no question that, upon the instructions so given, the verdict was based upon an unauthorized measure of damages.

GUY and BIJUR, JJ., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

EDWARD A. HENDRICKSON, Respondent, *v.* EMPIRE TRUST COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Assignments — unconditional — to trust company of shares of stock — order by decree of Surrogate's Court — contracts — negotiable instruments.

By a decree of the Surrogate's Court executors were ordered to assign and transfer to a designated trust company a certain number of shares of stock which, at the value found by the appraiser appointed to fix the value thereof and which constituted the bulk of the estate, together with a small amount in cash, made a total of $10,400 with interest, the claim therefor being based not upon any contract between the parties as evidenced by a note of $10,400 but upon the apparently unconditional assignment of an interest in the estate to the trust company. Held, that said decree simply fixed the extent of the interest of the trust company in the estate and in that respect was as binding on the trust company as upon the assignor and definitely determined what that interest was, and the share of the assignor remained as collateral in the hands of the trust company when transferred to it subject to all the conditions of the contract between it and said assignor, and that the value of the stock as between them was to be determined according to the terms of the note.

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APPEAL from a judgment of the City Court of the city of New York in favor of plaintiff after a trial by the court without a jury.

Barber, Watson & Gibboney (Charles E. McMahon, of counsel), for appellant.

Paul Jones, Jr., for respondent.

PHILBIN, J. The facts involved were agreed upon at the trial. The respondent's assignor, Lucia P. Tucker, borrowed $12,000 from the Windsor Trust Company, to whose rights and interests appellant succeeded by merger of the two companies.

The loan was made in August, 1910, and, as collateral security, there was then given a deed of some real estate in New Jersey, and an assignment of the interest of Mrs. Tucker to the extent of $12,000 in the estate of one Edward P. Hatch, then deceased. The loan was later reduced by a payment to $10,400, and the assignment of the interest in the Hatch estate was reduced to that amount. The new note, given by Mrs. Tucker for the latter sum, recites that she has deposited with said company, as collateral security for the payment thereof, an assignment, bearing date the 29th of August, 1910, of all her right, title and interest under the will of Edward P. Hatch, deceased, and the deed to the real estate in New Jersey, with power to the company to sell, without notice and without demand of payment, any of said securities at public or private sale; and that if the collateral thereto should be unsatisfactory to the company, through depreciation or otherwise, the maker of the note would forthwith make such payment on account or deposit such additional collateral as should be satisfactory to the payee. The note was dated the 30th of November, 1910, and was payable on demand.

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Thereafter the executors of the Hatch will filed their account in the Surrogate's Court and the Windsor Trust Company, as such assignee, was made a party to the proceedings that ensued and appeared therein and offered proof of its claim under the assignment. While the proceedings were pending a mortgage on the New Jersey property, so pledged by the plaintiff's assignor, was foreclosed and, out of the surplus proceeds of sale, there was paid to the appellant $2,714.28 and the same was duly credited on the above note for $10,400.

The referee in the Surrogate's Court proceedings found that the Windsor Trust Company was entitled to share in the interest of Lucia P. Tucker in said estate to the extent of $10,400, and interest from the 30th of November, 1910. Thereafter, on or about the 25th of May, 1914, upon an application made under section 2744 of the Code, an appraiser was appointed to fix the value of the stocks which constituted the bulk of the estate. No objection was made by the Windsor Trust Company to the appraisal proceedings nor to the value fixed by the appraiser's report. The decree of the surrogate, entered on the 6th of August, 1914, confirmed the report and directed, among other things, that the executors assign and transfer to Windsor Trust Company a certain number of shares of stock, which, at the value so found by the appraiser, and a small amount of cash, made up the total claim of $10,400 with interest. The decree further provided that such transfer and payment was in full satisfaction and discharge of the claim of Windsor Trust Company against Lucia P. Tucker, the estate or the executors above mentioned. No objection was made by the appellant trust company to the decree nor has any appeal been taken therefrom. On the 16th of December, 1914, the stock and cash were received by the appellant. The securities, so received, were later sold by the appellant

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at public auction and failed to yield sufficient to pay the amount due on the loan to Mrs. Tucker.

Upon the foregoing facts, the plaintiff, as assignee of Lucia P. Tucker, brought this action in conversion to recover the balance which he claims remained in appellant's hands because of the receipt by it of cash and securities from the Hatch estate, the value of which exceeded the amount then due on the note. This is based upon taking the value of the securities as fixed by the appraiser in the Surrogate's Court proceedings. The appellant claims that the securities and cash obtained from the estate were not received as payment of the debt due it, but only as collateral, and that the securities having realized less than the amount owing on the loan, instead of there being a balance in respondent's favor, there is still due the appellant a part of the debt of Mrs. Tucker. The respondent relies in support of his contention upon the wording of the surrogate's decree, above mentioned, and statements made by representatives of the appellant which, he claims, indicated an intention to accept the securities in payment at the value fixed by the appraiser. The decree of the surrogate was based, not upon the contract made between the parties, as evidenced by the note for $10,400, but upon the apparently unconditional assignment of an interest in the estate to the Windsor Trust Company. It simply fixed the extent of that interest and, in that respect, was fully as binding upon the trust company as upon Mrs. Tucker. It had the effect of definitely determining what that interest was, and the share of the plaintiff's assignor, as thus determined, remained as collateral in the hands of the company when transferred to it, subject to all the conditions of the contract between it and Mrs. Tucker. The value of the stock, as between them, was to be determined according to the terms of the note.

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The attitude taken by the appellant throughout the proceedings of the Surrogate's Court cannot be regarded as in any respect inconsistent with this view. Its status with Mrs. Tucker was fixed by the terms of the note, and the surrogate could only make an adjudication so far as the relation of the company, as assignee, to the decedent's estate was concerned.

The letters written on behalf of the appellant and the statements made by its representatives do not furnish adequate evidence of an intention to accept the securities, at the appraised value, in payment of the indebtedness. They are entirely consistent with the view that the appellant simply accepted the decree of the surrogate and the delivery of the securities as a change in the form only of the collateral.

The judgment should be reversed, with costs, and complaint dismissed, with costs.

GUY and BIJUR, JJ., concur.

Judgment reversed, with costs.

H. W. MILLER, INC., Appellant, v. THOMAS B. LEAHY BUILDING COMPANY, Respondent.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Judgments — correction of — reinstatement of — evidence — Municipal Court Code, § 6 (7).

Under section 6 (7) of the Municipal Court Code the Municipal Court of the city of New York upon the theory of correcting a judgment entered in favor of plaintiff and sustained by the evidence is without authority to enter judgment in favor of defendant on a counterclaim, and on motion the original judgment will be reinstated subject, however, to an application to correct and vacate it on sufficient grounds.

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APPEAL from a judgment and orders of the Municipal Court of the city of New York, borough of Manhattan, fourth district.

Montefiore M. Henschel (Andrew S. Fraser, of counsel), for appellant.

Aaron Honig, for respondent.

PHILBIN, J. This is an appeal from a judgment of the Municipal Court of the borough of Manhattan, fourth district, entered in favor of the defendant and against the plaintiff on a counterclaim, and from an order denying the motion to set aside said judgment and for a new trial. Appeal is also taken from an order which vacated, amended and set aside a judgment previously entered in favor of the plaintiff.

The plaintiff sued to recover a sum alleged to be due for certain work, labor and services, and materials furnished, and for which the defendant agreed to pay. A similar action was brought as to another contract of a like nature relating to another building referred to as the Nurses' Home. The two actions were tried upon the same record and for convenience of designation they were known as the Hospital Pavilion action and the Nurses' Home action. On this appeal we are only concerned with the former action in relation to the hospital pavilion. The defendant admitted that there was due the plaintiff the sum of $468.60, but put in a counterclaim of $503.34, claimed to be due defendant in relation to another transaction between the parties. The case was tried without a jury, the trial taking place on the 14th of October, 1915. Thereafter, on the 20th of October, 1915, the justice rendered judgment in favor of the plaintiff for $636.60, and costs, judgment was duly entered accordingly and was so recorded in the office of the clerk. On the 21st of October, the

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following day, without anything further transpiring in the way of motions by or notice to either party, or additional evidence, the justice handed down another decision reading as follows: "I hereby find and decide that defendant is entitled to judgment in its favor, with costs, and to an affirmative judgment on counterclaim in the sum of $14.74, and the clerk is hereby directed to enter judgment accordingly, correcting judgment heretofore entered on the 20th of October, 1915." The plaintiff, thereafter, and on the 29th of October, 1915, made a motion to vacate, correct and modify, in furtherance of justice and for error, the judgment entered in favor of the defendant and to reinstate the judgment entered in favor of the plaintiff for $636.60, and for a new trial. The motion was denied.

It does not appear from the foregoing, that the justice expressly intended to vacate the first judgment, but proceeded on the theory of a correction of the same. The right to do so is the principal ground for appeal. If the court had authority, then I think that the second judgment in favor of the defendant should be allowed to stand, as it is adequately supported by the proof and there was no prejudicial error committed during the trial. Taking up, therefore, the question of the court's authority, it will be observed that there are two aspects presented — first, the right of the court to nullify the original judgment in favor of the plaintiff, and, secondly, the right to direct a new judgment in favor of the defendant. Nothing is disclosed by the record to indicate upon what ground the justice assumed to act. It is not made clear why, in furtherance of justice for any error in form or substance, the so-called correction should have been made. It would seem obvious that to nullify a judgment, duly entered, and to substitute therefor an entirely different adjudi-

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cation, cannot be considered a correction within the meaning of the act. Mun. Ct. Code, § 6, subd. 7. The effect of the court's action was not merely to correct the original judgment, but to vacate it and, in that event, the only function that he could then perform with respect to the litigation was to order a new trial. There is every reason to believe that the power vested in the Municipal Court in relation to judgments under the Municipal Court Code was wisely bestowed and serves a useful purpose, but there is no reason why its use should be extended beyond the plain meaning of the act. As was said in *Petsche* v. *McDonald*, 94 Misc Rep. 655, the error in form or substance referred to in the law plainly relates to errors found in the record itself, for such an error only can be one in form or substance, and if a judgment be vacated the issues then remain undetermined and a new trial must be had as a matter of course. The original judgment in favor of the plaintiff was sustained by the evidence, and, as has already been said, there was nothing to show that any error occurred in relation to the entry of that judgment.

It must be found that there was error in making the orders appealed from and that the judgment for defendant was unauthorized. This conclusion will have the effect of restoring the judgment originally entered in favor of the plaintiff, but it is not intended to say anything that would interfere with the court giving consideration to any application made to correct and vacate said judgment upon sufficient grounds.

Judgment and orders appealed from reversed with thirty dollars costs, and judgment of October 20, 1915, reinstated.

GUY and BIJUR, JJ., concur.

Judgment and orders appealed from reversed, with costs.

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JOHN F. SIPE and HARRY E. SIPE, Respondents, v. NATIONAL SILK DYEING COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Sales — warranty — when action to recover purchase price will not lie — when warranty cannot be construed as waiver.

Where motor truck wheels sold under an express warranty for a year prove defective after a few days' use an action by the seller to recover the purchase price will not lie.

The retention by the buyer of an invoice in which an attempt was made to modify the warranty cannot be construed as a waiver thereof, nor can the retention of the wheels to allow the seller time to furnish satisfactory wheels have such effect.

APPEAL from a judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, in favor of plaintiffs.

Merrill, Rogers & Terry (Edward Ward McMahon and Crittenden H. Adams, of counsel), for appellant.

Louis H. Porter (William C. Dodge, of counsel), for respondents.

PHILBIN, J. The plaintiffs brought this action to recover the agreed price of two patented wheels made for the defendant's motor truck. The agreement to sell was made orally, but confirmed by a letter, dated the 7th of April, 1915, from the plaintiffs, in which it was stated that the wheels were sold subject to a trial for thirty days immediately following delivery. The plaintiffs also guaranteed the wheels "for one year without restriction, including even accidents, excepting abuse only." The delivery of the goods by the plaintiff to the defendant was made on the 16th of June,

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1915, and they were put in use shortly thereafter. After using the wheels for a few days, one of them had to be removed because of defects, and was returned to plaintiffs for repairs. Thereafter, other defects developed, and plaintiffs made repairs from time to time until some day in August. By a letter dated the 27th of August, 1915, the plaintiffs said they would replace the defective yokes of the wheels. It was testified on behalf of the defendant that in July a representative of the defendant spoke on the telephone to one Lytol, the salesman of the plaintiff who made the sale to defendant, and told him of the trouble being had with the wheels and that Lytol said, in substance, to never mind the thirty days' limitation, that the plaintiffs would give the defendant ninety days for the trial of the wheels. Lytol was not produced as a witness and did not, therefore, deny this conversation. The only attempt to show that the extension was not thus given was in the testimony of one of the plaintiffs, who testified that Lytol rarely came to the plaintiffs' place of business. The fact that the plaintiffs made repairs long after the thirty-day period expired, tends to support defendant's claim of an extension for ninety days, or until the 16th of September, 1915, for the trial of the wheels by defendant. The defendant could not be deemed to have accepted the goods until the trial period had expired, particularly in view of the defects which admittedly existed. It offered to return the wheels on the 3d of September, 1915.

There was an express warranty for one year, and it was certainly intended that the wheels furnished should be free from defects, even latent defects. The plaintiffs claim that the warranty was limited to the duty of keeping the wheels in repair, and rely upon some wording used in the invoice. The latter states that they will supply, without charge, any part or do

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any repairs due to faulty workmanship, or material or to any cause whatsoever, except the results of accident or abuse. It was not intended merely that the plaintiffs would repair any defects in the wheels during the year without charge. The defendant was entitled to have wheels that would give service practically uninterrupted by repairs of defects.

The terms of the sale were expressed in the letter above referred to, and included a warranty for one year without any reference to workmanship, materials or repairs. The agreement originally made could not be modified simply by inserting a different version in the invoice. The plaintiffs endeavor to show that the attempted modification was accepted because the invoice was retained by the defendant, and cite some authorities bearing upon the question of account stated, but it is obvious that such a theory is inapplicable.

The circumstances would have justified the defendant rejecting the goods shortly after delivery, and its indulgence in giving the plaintiffs repeated opportunities to furnish a wheel that would conform to the terms of the contract should not be allowed to operate to its detriment. There has been no waiver of the breach of plaintiff's warranty shown.

The fact that the wheels were the subject of frequent repairs by the plaintiffs, and that defendant refrained from making any payment on account of the purchase, negatives any suggestion of acceptance, and rather indicates a determination of the defendant to insist upon the warranty being made good. The plaintiffs had no justification for believing that the defendant ever intended to accept a performance of the contract so clearly inadequate. Even if the court found that the alleged extension of ninety days for trial of the wheels had not been given, there is sufficient in the attitude that the parties had been shown to have taken to

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preclude the conclusion that there was a waiver or acceptance by the defendant. The use of the wheels as late as October, as claimed by the plaintiffs, cannot sustain a contrary finding. *McCormick Harvesting Machine Co.* v. *Warfield,* 33 App. Div. 513; *Dochtermann U. & E. Co.* v. *Fiss, Doerr & Carroll Co.,* 155 id. 162. The evidence having established that there had been a breach of warranty on the part of the plaintiffs and that the defendant was not precluded from availing itself of that defense by waiver or otherwise, it was error to give judgment to the plaintiffs.

GUY and BIJUR, JJ., concur.

Judgment reversed, and new trial ordered, with thirty dollars costs to appellant to abide event.

DAVID ZABLUDOWSKY, Respondent, *v.* BENJAMIN GOTTFRIED, Appellant.*

(Supreme Court, Appellate Term, First Department, June, 1916.)

Accord and satisfaction — when there is an — partnership — when action barred.

Where upon the dissolution of a partnership plaintiff sold to defendant his interest in the business for $2,500, payable $1,000 in cash and $1,500 in three notes for $500 each, and shortly before the maturity of the first note plaintiff accepted $500 from the defendant and surrendered all the notes, there was an accord and satisfaction which barred an action to recover the balance of the purchase price.

APPEAL from a judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, entered upon a verdict directed in favor of the plaintiff.

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* Upon reargument, decision set aside and judgment affirmed. See 160 N. Y. Supp. 851.—[REPR.

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Goldstein & Goldstein (Abraham Lipton, of counsel), for appellant.

Charles S. Rosenberg, for respondent.

PHILBIN, J. The parties entered into a dissolution agreement in writing whereby the plaintiff sold to the defendant his interest in the business for $2,500 payable $1,000 in cash, and $1,500 in three promissory notes of $500 each, payable on the 1st of May, 2d of September, 1915, and 1st of January, 1916, respectively. On the 26th of April, 1916, or shortly before the first note matured, the plaintiff accepted $500 from the defendant and surrendered all the notes. He also gave defendant a receipt for "payment in full for all claims up to date and have no further claims of any kind. New York April 26, 1915." The plaintiff now sues for the balance of $1,000, and the defendant claims accord and satisfaction and that the acceptance by the plaintiff of the payment of $500 before the debt became due, his surrender of the notes and the execution and delivery of the receipt in full were a bar to an action for any further sum. It must be so held. The parties entered into a new agreement wherein the defendant bound himself to pay $500 immediately, which, under the original contract, he was not bound to do, and the payment was made accordingly. The plaintiff on his part agreed to forgive the entire debt upon such immediate payment of part thereof. The new agreement was in all respects valid and was a good accord and satisfaction.

GUY and BIJUR, JJ., concur.

Judgment reversed, with thirty dollars costs, and complaint dismissed, with costs.

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GAGEN & BUTLER, INC., Respondent, v. FRANCO-AMERICAN CHEMICAL COMPANY, INC., Appellant.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Contracts — failure to establish contractual relations — evidence — corporations — judgments.

Where in an action to recover for services rendered and goods sold and delivered the evidence is entirely consistent with the claim of defendant that its connection with a corporation with which all the dealings with plaintiff were had was simply that of one who had advanced money under a trade agreement, which was the fact, and plaintiff fails to establish either directly or indirectly any contractual relations with defendant, and it appears that the agreement between plaintiff and the corporation confirmed by their correspondence did not contemplate any liability on the part of defendant but that exclusive credit was given to the corporation, a judgment in favor of plaintiff will be reversed and the complaint dismissed.

APPEAL from a judgment of the Municipal Court of the city of New York, borough of Manhattan, ninth district, rendered in favor of plaintiff, after a trial by the court without a jury.

Milton Mayer (Milton Mayer and Goodman Block, of counsel), for appellant.

King & Smith (William J. Smith, of counsel), for respondent.

PHILBIN, J. The action was brought to recover for services rendered and electrical goods sold and delivered by the plaintiff to the defendant. The answer was a general denial. The defendant claims that if

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any liability was created, it was that of a corporation known as the Divided Metals Company. The plaintiff says that all dealings were really with the defendant, since the Divided Metals Company was the agent of the defendant. In September, 1915, the president of the latter company, one Britton, informed the plaintiff's president, one Gagen, that he and one Robitaille, an officer of the defendant, were in search of a building for factory purposes and in which machinery could be installed for the grinding of aluminum. Thereafter, the three men visited and inspected a certain building. On that occasion the nature of the electrical equipment was discussed and Gagen's advice was asked. Robitaille finally at that time told Gagen to go ahead and equip the building. The former was not then connected with the Divided Metals Company. Later it was decided to take another building instead, and Gagen examined it in the presence of Robitaille and Britton and was told by them to go ahead with the necessary equipment. On that occasion the latter was president of the Divided Metals Company, and Robitaille vice-president and still an officer of the defendant. Shortly after this last meeting, and on the 18th of October, 1915, the plaintiff wrote a letter to the Divided Metals Company saying that in accordance with the verbal instructions received from Britton it was proceeding with the installation of the electrical equipment therein stated and giving the cost of the latter. The said company wrote acknowledging the receipt of the above letter and referred to changes in the work. A letter by the Divided Metals Company to the defendant was written about this time concerning the contract with the plaintiff and asking for a check for plaintiff for account of the Divided Metals Company. On the 25th of October, 1915, the said company wrote plaintiff enclosing a copy of the last letter directing payment to the

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plaintiff. The plaintiff received a check of the defendant to its order on or about the 27th of October, 1915, for $447.50. Various bills or statements of the plaintiff made out to the Divided Metals Company for the work were later sent to the latter. Certain certificates in relation to the premises in question were issued to the said company by the New York board of fire underwriters. The lease of the premises was made to the Divided Metals Company. It would thus appear, so far as the foregoing writings were concerned, with the possible exception of defendant's check, that the transaction was with the Divided Metals Company. The plaintiff began work on or about the 18th of October, 1915, and there is evidence to sustain its claim that it was completed according to the contract. It was testified on behalf of the plaintiff that frequently during the progress of the work Robitaille and the treasurer of the defendant were about the premises and gave directions to the plaintiff and its workmen, but that was denied by the defendant. It was also shown on behalf of the plaintiff that bills for the work were sent by the Divided Metals Company to the defendant and that the latter gave checks for them to the Divided Metals Company. Both Robitaille and Britton had told Gagen that the defendant was to furnish the moneys necessary for the plaintiff's work in equipping the building.

While the plaintiff asserts that the contract was made direct with the defendant, through Robitaille, its officer, the plaintiff apparently really relies upon the theory of the alleged authority of the Divided Metals Company as its agent, and this appears to be the only ground upon which plaintiff can fasten a liability upon the defendant in view of the plaintiff's relations with the said company, as indicated by the correspondence and bills. All that has appeared is entirely consistent

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with the claim of the defendant that its connection with the Divided Metals Company was simply that of one who had advanced moneys under a trade agreement, which was the fact.

Gagen testified that he was told by Britton before he ever met Robitaille as to the provisions of a contract between the Divided Metals Company and the defendant.

The relations of the two companies were defined by an agreement, bearing date the 11th of October, 1915. It provided for the advance of $3,000 by the defendant to the company from time to time to be used in equipping and operating the latter's manufacturing plant in the city of New York. The money was to be repaid to the defendant in three months from the date of the agreement. The defendant was to have the right to retain from moneys that might come into its hands from time to time sums over the estimated running expenses of the company for one month. Provision was likewise made for a possible extension of the time of repayment. The defendant was given the exclusive agency for the selling of the company's output at certain specified prices. The agreement was signed on behalf of the companies by Robitaille and Britton, as presidents, respectively.

The plaintiff placed some reliance upon the foregoing agreement in its contention that the defendant was the undisclosed principal of the Dvided Metals Company, but I do not see how such a deduction can be drawn. It must be found that the plaintiff failed to establish that the defendant had directly or indirectly entered into any contractual relations with it. On the contrary, the conclusion is compelled that the contract expressly entered into by the plaintiff with the Divided Metals Company by virtue of the oral agreement and confirmed by the correspondence between them did not

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contemplate any liability on the part of the defendant, but exclusive credit was given the other company.

GUY and BIJUR, JJ., concur.

Judgment reversed, with thirty dollars costs, and complaint dismissed, with costs.

HERMAN H. FAJEN and FREDERICK FAJEN, Respondents, *v.* HUDSON TRANSPORTATION COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Money had and received — negotiable instruments — actions — mistake — judgments.

A check payable to defendant was after indorsement by its agent and at his request cashed by plaintiffs, deposited in their bank and in due course collected from defendant's bank, and defendant, after procuring the canceled check, made affidavit that its agent was never authorized to cash or indorse it and requested repayment. Held, that in an action to recover the money repaid to defendant, brought on the theory of an action for money had and received arising out of a mistake of fact, a judgment in favor of plaintiffs should be reversed and the complaint dismissed.

BIJUR, J., dissents.

APPEAL from a judgment of the City Court of the city of New York, entered upon a verdict, and from an order denying defendant's motion for a new trial.

Kilroe & Swarts (Louis E. Swarts, of counsel), for appellant.

Shiland & Hedges (Arleigh Pelham and Wm. E. Shrewsbury, of counsel), for respondents.

PHILBIN, J. Appeal is taken from a judgment of the City Court of the city of New York, entered upon a verdict by a jury, in favor of the plaintiffs for the

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sum of $485.51, damages and costs, and from an order denying the defendant's motion to set aside the verdict and for a new trial.

In the year 1913, one William H. Nottage was in the employ of the defendant as master of a barge owned by it and known as "John D. Paige."

Nottage received from the Barker Bond Lumber Company a check bearing date the 10th of October, 1913, for $297.74, in payment of freight due on a cargo carried by the barge. The check was drawn on the National Produce Exchange Bank and was made to the order of "Barge John D. Paige & owners." It was endorsed by Nottage, but there was added to the endorsement: "William H. Nottage, Master." The plaintiffs cashed the check by paying the amount thereof to Nottage, at his request. Thereafter, the check was deposited by plaintiffs to their credit in the Corn Exchange Bank, which later, in due course, collected the amount from the National Produce Exchange Bank, where the drawer, Barker Bond Lumber Company, had an account. The defendant, on or about the 6th of January, 1914, procured the cancelled check and submitted it, together with an affidavit, to the National Produce Exchange Bank and requested payment of the amount of the check. The affidavit was made by the vice-president and treasurer of the defendant and set forth, that Nottage was never authorized to cash or endorse the said check or any negotiable paper payable to the barge John D. Paige and owners on behalf of the Hudson Transportation Company and that he had no authority to do so. Thereupon, that bank delivered the check and affidavit to the Corn Exchange Bank, and upon the latter presenting those papers to the plaintiffs they repaid the amount of the check to the Corn Exchange Bank and later, through the National Produce Exchange Bank, the money was paid to the defendant.

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The plaintiffs conducted a liquor saloon and never had had any business transactions with the defendant or Nottage, except that they had cashed similar checks for the latter. They knew Nottage only as an occasional patron of their establishment, and did not know by whom he was employed. Plaintiffs did not know who were the owners of the barge *John D. Paige*. They never had any communication with defendant prior to the payment of the money by them to Nottage.

The plaintiffs proceeded on the theory of an action for money had and received arising out of a mistake of fact. It is claimed by the plaintiffs that the alleged mistake occurred when they paid back to the Corn Exchange Bank the money paid to Nottage on the check. It is said that plaintiffs were caused to make the mistake by the averments in the foregoing affidavit as to Nottage's absence of authority, the averments being contrary to the fact. It is admitted by plaintiffs that if the statements in the affidavit were true they made no mistake in refunding the money. The absence of any allegation of fraud, committed by defendant, leads to the inference that by mistake plaintiffs meant a mutual mistake of fact. The circumstances, however, preclude acceptance of a suggestion that defendant made an incorrect statement through mere mistake, as defendant was in a position to know whether Nottage had received authority from it. The theory of a mistake cannot be sustained and, therefore, if the plaintiffs were entitled to recover, it must be on the ground that they were wrongfully induced to part with their money because of untrue representations made by defendant. It is necessary in any event to ascertain just what the relations of Nottage and defendant were in order to determine whether the former had no right, as claimed by the defendant, to endorse and cash the checks.

As master of the barge Nottage conducted voyages

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from Norfolk, Va., defendant's place of business, to New York city, and other ports. He employed a crew and also men to discharge the cargo that was usually carried. He likewise collected the freight charges. In short he conducted all the business of the defendant in each port in relation to the cargo which the barge brought. Nottage, when examined on behalf of the plaintiffs, testified that he would make remittances from time to time for the freight collected, less the expenses incurred. Plaintiffs conceded on the trial that Nottage was never told by defendant that he could endorse or cash checks. About five months before the occasion in question the defendant wrote him a letter, in which the following appeared: "You will please draw as much freight as you can and send us at as early a date as possible. Have all checks made payable to the Hudson Transportation Company." It is a fair inference that by freight was meant the money due therefor. It was shown that he had at times received and forwarded checks for freight to the defendant. He testified that the Barker Bond Lumber Company, the maker of the check in question, always paid for freight by check, and that at least on one occasion the check was not made to the order of the defendant but was drawn to pay stevedores on defendant's account. It does not appear that if such was the custom it was known to the defendant. Nottage did business with a concern known as the Cahill Towing Line which towed the barge from time to time, when necessary. The manager of the company stated that he had cashed checks for Nottage and had drawn checks for a part thereof to the order of the defendant. It further appeared that the stevedores' expenses were paid by Nottage by orders on the Barker Bond Lumber Company. This was done pursuant to directions of the defendant's vice-president who also told Nottage that if

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he wanted money the company would send it to him and that all checks should be made payable to the defendant. Defendant likewise instructed Nottage not to forward money through Cahill, but to send the check received itself to the defendant. It accordingly appears that it was not necessary in the course of business that Nottage should cash checks received for defendant in order to pay the required expenses and, therefore, there was nothing that would justify the finding that the nature of his employment was one from which an inference of such a right could be correctly drawn. In other words, the record is barren of any proof that the defendant ever knew or had reason to believe that Nottage endorsed or cashed a check before he did so as to the one in question. It is true that he had before induced plaintiffs to cash checks in all respects similar, except as to the amounts and dates, but there is nothing upon which knowledge of the transactions by the defendant could be predicated. It will, therefore, be seen that the only ground upon which it could be properly insisted that he had authority is that the character of his agency conferred it upon him, even though his employer, the defendant, did not know he was exercising it.

In taking up this point for consideration, the peculiar circumstances should not be overlooked. The attitude taken by the courts in cases where a dishonest agent has misappropriated the proceeds of a check and the employer has not been allowed to evade responsibility and deny the agent's authority is not applicable. The counsel for the plaintiffs correctly says that the test is to be applied as of the time when the plaintiffs refunded the money for which they are now suing, and not the time they cashed the check for Nottage. It is, therefore, in the instant case, the act of the principal in making the alleged false statement upon which the

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liability is placed, and not the act of the agent proceeding under ostensible authority. It was the alleged wrongful act of the defendant that caused the plaintiffs to part with their money and not the wrong originally done by Nottage. For these reasons, the line of cases that have held the employer responsible for the acts of a dishonest servant is not pertinent. The power to collect a debt does not involve authority to endorse or cash checks given in payment of it and, as appears from what has been said, Nottage had no other power. The fact that he had been given discretion to expend money for labor and other incidental things in the business did not give him the right to procure the necessary money by signing or endorsing checks or other negotiable paper. It has been shown that even as to that he was furnished with moneys by customers and the defendant itself. It must be held that the statements made in the affidavit that Nottage had no authority to endorse checks were founded on fact and that no false representation was made. The plaintiffs under these circumstances having willingly and without any improper inducement paid the money are not entitled to recover.

GUY, J., concurs in result.

Judgment and order reversed, with costs, and complaint dismissed, with costs.

BIJUR, J. (dissenting). Plaintiffs sue for money had and received, the cause of action arising out of the following circumstances. Defendant owned the barge *John D. Paige* of which one Nottage was master. It arrived in New York October 10, 1913, with a cargo for the Barker Bond Lumber Company. The latter drew its check on the New York Produce Exchange

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Bank for $297.74 in part payment of the freight to the order of the "Barge John D. Paige and owners." Nottage took the check to plaintiffs, who are otherwise strangers to the entire transaction, endorsed it "Barge John D. Paige and owners, William H. Nottage, Master," and thereupon plaintiffs cashed the check giving the cash to Nottage. They then deposited the check in their own bank, the Corn Exchange Bank. In January, 1914, defendant having in some way, which is not explained, obtained possession of the check, presented it to the Produce Exchange Bank (which it will be remembered was the depositary of the drawer) together with an affidavit subscribed by one Hudson, vice-president of defendant, in which affidavit occurs the following sentence: "that the Hudson Transportation Company never authorized the said William H. Nottage to cash the said check or to endorse said check or any negotiable paper payable to the Barge John D. Paige and owners on behalf of the Hudson Transportation Company." The Produce Exchange Bank presented the affidavit and check to the Corn Exchange Bank, which in turn presented it to its customer, the plaintiffs, who, relying on the statement in the affidavit, refunded the amount to the Corn Exchange Bank, which in turn re-imbursed the Produce Exchange Bank. The complaint, so far as material, alleges these facts together with the statement "that the said William H. Nottage was at that time authorized by the defendant to endorse the said checks and to receive the proceeds thereof."

On the trial the actual facts were not seriously disputed. Plaintiff conceded that Nottage has not been expressly authorized to endorse checks drawn to the order of defendant. The actual controversy as litigated was whether he had been impliedly authorized to endorse. Much confusion seems to have arisen both upon the trial and upon this appeal through a failure

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to define the cause of action, and through plaintiffs' counsel's evident desire to employ a euphemism in his characterization of the defendant's course of conduct in the premises. He invariably refers to the cause of action which he is pursuing as for money had and received arising out of a "mistake" of fact. It is quite clear that plaintiffs do not intend to impute to defendant a wilful and deliberate intent to defraud; but it is difficult to interpret the concurrent allegations in the complaint that defendant's vice-president swore to the statement that defendant never authorized Nottage to endorse any negotiable paper payable to said barge or to the defendant, and that Nottage was at that time authorized by the defendant to endorse said check and receive the proceeds thereof, except as a charge of misrepresentation. It is true that there is no allegation in the complaint that the defendant knew at the time the misrepresentation was made that it was false, nor that it was made with intent to deceive the plaintiffs, but no objection on this ground was made to the complaint at any stage of the proceedings. The proof that the defendant knew, or as a reasonable person should have known, that the statement was false, was, as I shall show, not only admitted without objection, but a large part of it was furnished by the testimony on behalf of defendant itself; and the latter fact is one which necessarily follows from the proofs adduced also.

The only doubt which I have had about the right of plaintiffs to recover is in respect to the question whether the allegation in defendant's affidavit was a statement of *fact* in such sense as to make it actionable While this point also has not been treated either at the trial or in the briefs, it seems to me that under the circumstances the statement was, and was intended to be, the statement of a fact (*People* v. *Mingey*, 190

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N. Y. 61–64–66; *Sweet* v. *Tuttle,* 14 id. 465; *Knapp* v. *Smith,* 27 id. 277); and if, as I shall assume, in harmony with the tone in which the case was tried, that the defendant did not wilfully intend to deceive, it is manifest from the testimony that the statement was recklessly made without due regard to the facts in possession of the defendant. Here again confusion was caused by the failure of both parties to preserve the distinction between express authority and implied authority on the one hand and the doctrine of estoppel on the other. The learned judge below correctly charged that authority conferred by implication is as much *actual* authority as authority expressly conferred. That a plaintiff frequently can hold a principal by virtue of the alleged authority of an agent where the principal has held the agent out as authorized to do the particular act at issue depends upon the rule of evidence known as estoppel, whereunder the principal is not permitted to deny the authority — although it does not exist — because he has by his words or conduct led others to believe that it did exist. With the principle of estoppel this case is not concerned in any way.

On the other hand, there is abundant evidence that the defendant permitted and authorized Nottage to conduct the voyages of the barge in his own way; to deliver the cargo as he might think best; to employ and pay on their responsibility such help as might be necessary; to similarly defray all the appropriate charges and expenses; and to collect the freight and to pay these charges and expenses therefrom, furnishing him no other funds with which to do it.

The jury was well warranted in finding that for the purposes of conducting the voyages of this barge and for delivering the cargo and collecting the receipts, Nottage was the general agent of the defendant with

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full authority in the premises, and this conclusion of implied authority was quite justified notwithstanding the only item in the proof which seems to throw any doubt on it, and which consisted of a letter of May 22, 1913, relating to one voyage anterior to the one which resulted in the transactions involved in this suit. In that letter the defendant, writing to Nottage, said: "You will please draw as much freight as you can and send us at as early a date as possible. Have all checks made payable to the Hudson Transportation Company." This last sentence strikes me as quite inconclusive. It was at best a mere direction regarding the defendant's convenience. But whatever it may have been intended to be, it was entirely superseded by the defendant's course of conduct thereafter as testified to. It is true that Hudson testified that he did not know that Nottage was endorsing checks, but he also testified in substance that the defendant left the winding up of the results of the voyages entirely to Nottage and received the net proceeds from him without any inquiry as to how he had defrayed expenses or any other detail. Nottage denied that he had ever been instructed not to endorse checks.

It is, as I have said, quite manifest on this record that there was ample evidence on which the jury could find that Nottage was authorized to collect and disburse the proceeds of the voyages, and this necessarily included the right to endorse checks drawn to the order of defendant in payment of the freights earned on these voyages. *Burstein* v. *Sullivan,* 134 App. Div. 623; *Morrison* v. *Chapman,* 155 id. 509.

There are some suggestions in the briefs concerning the possibility that plaintiffs at the time they re-imbursed the bank were as fully cognizant as at the time of the trial of all the facts on which they relied to prove Nottage's implied authority, and that, therefore,

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they are not at liberty to avail of a mistake of fact. I have endeavored to point out that no question of "mistake" is involved, but at all events, regarding the action from any point of view, this particular objection was not raised at the trial in any form. Moreover, regarding the statement of defendant in its affidavit as a misrepresentation, it was not a representation as to a physical fact concerning which opportunity of knowledge was as open to the plaintiffs as to the defendant, but was one concerning the condition of the relations between defendant and its own servant, and I know of no case which holds that plaintiffs were bound to search their recollection and analyze all their previous relations with Nottage before they should be entitled to rely upon the defendant's point-blank categorical statement.

Finally, even were I incorrect in this conclusion, it appears clearly in the record that a great part of the facts upon which the implied authority of Nottage is predicated was not and could not be in the ordinary course known to plaintiffs, for it consisted of transactions exclusively between Nottage and defendant as testified to by defendant's vice-president, and partly by Nottage, concerning the matter in which the proceeds of this and prior voyages had been dealt with and adjusted between them.

The court below submitted to the jury as the single issue to be determined: "If it is shown by the proof here — if the circumstances indicate a preponderating amount of proof on the claim that there was an implied agency, then you find for the plaintiff for the sum of $334.95."

Although, as I have indicated, there has been considerable confusion at the trial as to the correct name which should be applied to the cause of action, it is quite manifest from the record that what the parties

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actually litigated *by mutual consent* was the question whether Nottage had the implied authority of the defendant to endorse checks drawn as was the one involved in this action in the course of the business of the barge, and the jury was instructed that if he had such authority the plaintiff should recover, and, if not, then their verdict should be for the defendant.

I am of opinion, therefore, that the recovery was warranted as one for money had and received and paid by the plaintiffs to defendant upon the defendant's false representation that Nottage was not authorized to endorse said check or other commercial paper on defendant's behalf; that such defects as existed in the complaint by failure to state certain elements of such a cause of action were not pointed out or even hinted at by the defendant at the trial, and that, in any event, the complaint may be deemed amended to conform with the proofs admitted either without objection or if over objection then properly so admitted as within the issues made by the complaint as actually framed.

Judgment and order reversed with costs.

JACOB PINSKY, Respondent, *v.* ISIDOR GOLDSMITH, Appellant.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Sales — conditional — action to foreclose lien of contract — trial — evidence — pleading.

All installments of the purchase price under a contract for the conditional sale of certain fixtures and like articles relating to the equipment of a cigar and stationery store conducted by defendant were paid except two represented by notes given by the buyer, and the contract provided that for failure to pay

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any installments upon maturity all future installments should immediately become due and payable. In an action to foreclose the lien of the contract and to have the property covered thereby sold, based upon an alleged default in the payment of the first of the unpaid installments of the purchase price, it appeared that defendant upon receiving notice that his notes were held by a trust company and bank mailed to it at maturity a certified check payable to the order of the bank which the trust company received and returned the same day and presented the note for payment at defendant's address and protested it for nonpayment. Held, that defendant having already paid the note according to his justifiable understanding was entitled to disregard a demand that he take the matter up with the bank; that such demand would not support the action.

It having been stipulated on the trial that plaintiff had put the four notes given in the transaction in the hands of the trust company and bank, a letter from the trust company mailed to defendant acknowledging the receipt of and return of the certified check, was admissible in evidence.

A tender and payment into court of the amount of the note given for one of the unpaid installments of the purchase price was sufficient and the effect thereof was not destroyed by a counterclaim for damages based on a partial breach of the contract of conditional sale nor was plaintiff under necessity of putting in any evidence in support of the *prima facie* case on the note.

APPEAL from a judgment of the Municipal Court of the city of New York, borough of Manhattan, eighth district, in favor of plaintiff, after a trial by the court without a jury.

Henry Brill, for appellant.

William L. Greenfogel, for respondent.

PHILBIN, J. The action was brought to foreclose the lien of a conditional sale agreement and to have the personal property covered thereby sold to enforce the

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lien. The pleadings were oral. The answer was a general denial and a counterclaim for $100 which, it developed on the trial, was based upon an alleged failure of the plaintiff to fully comply with the terms of the said agreement of sale. The counterclaim was dismissed by the court on the ground that it was not available as a defense in an action to foreclose a lien. The agreement provided for the conditional sale to the defendant of certain fixtures and like articles relating to the equipment of a cigar and stationery store conducted by the defendant, for five hundred and fifty dollars. That sum was to be paid in various instalments, all of which were paid, except one of twenty-five dollars and forty-four cents, due on first March, and one for twenty-five dollars due on 1st April, 1916. They were represented by notes given by the defendant to the plaintiff. It was provided in the agreement that the failure to pay any instalment upon maturity would cause all future instalments to become due and payable immediately.

The action was based upon an alleged default in the payment of the March instalment. The defendant claims that it having been shown on the trial that payment of the note was duly tendered on the first of March, the date of maturity, and that the tender was kept good, the complaint should have been dismissed. Shortly before the note matured, the defendant received the following communication:

"The Chatham & Phenix National Bank, U. S. Mortgage & Trust Co., 125th St. & Eighth Ave.

"This is to advise you that your note for $25.44 which will be due and payable March 1st, 1916, is held by this bank.

"I. GOLDSMITH, 3866 Broadway, City.

"Only cash or certified check accepted in payment."

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It was stipulated on the trial that the plaintiff had put the four notes given in the transaction, including the March note, "in the Chatham & Phenix National Bank, United States Mortgage & Trust Company, 125th. Street and Eighth Avenue." Just what relation the two corporations had to each other or to the notes was not developed, although, as it later appears, the trust company protested the March note. The defenddant on the date of maturity and at five o'clock in the morning mailed a certified check for twenty-five dollars and forty-four cents to the trust company, but it was made to the order of the bank. The place of mailing was in the same section of the city and the check was received on the same day, as appears by a letter from the trust company. This letter bears date the 1st of March, 1916, and says the company is returning the check, "as the item you intended to take up has been returned by us to the Chatham and Phenix National Bank. We would suggest that you take the matter up direct." The letter was not received by defendant until the next day, the 2d of March, 1196. Notwithstanding all this, the trust company presented the note for payment at defendant's address, where it was made payable, and protested the note for nonpayment. The defendant having already paid the note according to his justifiable understanding was entitled to disregard the demand. The letter last referred to was not received in evidence upon the trial owing to an objection by the plaintiff, but it should have been, in view of the concession made on the trial as to the relation of the trust company to the note. Upon the return day of the summons in this action, the defendant made a tender of performance and of payment. The amount of the tender, twenty-five dollars and forty-four cents, being the sum called for by the note, was paid into court. The plaintiff insists that the tender

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made at the trial was not good because of defendant's counterclaim and in support of his contention cites *Wood* v. *Hitchcock,* 20 Wend. 47, in which it was held that the counterclaim there pleaded destroyed the effect of the tender because the defendant would not allow that he was even liable to the full amount of what was tendered. That was not the situation here. The defendant did not question his full liability on the March note, and his counterclaim related only to an alleged partial breach of the contract which, he said, gave him a right to compensation for the injury caused by the breach. Under the issues thus formed, the plaintiff was under no necessity of putting in any evidence in support of *prima facie* case on the note.

The failure of the defendant to pay the note upon maturity must in all the circumstances be found due to the refusal of the holder to accept payment and not to any default on his part. A sufficient tender of payment was made and kept good to excuse defendant from further performance.

There were what purported to be two judgments entered against the defendant, although it does not appear that that was the intention. The first entry was in the usual form, but stated: "See special form of judgment." Thereafter, a form appropriate to a foreclosure judgment was entered. The first provided for the payment of fifty-one dollars and fifty cents, and the second for seventy dollars and fifty cents. In view of the conclusion that plaintiff is not entitled to judgment in any form, it is unnecessary to give further consideration to the irregularity than to say that the first judgment ceases to be of any effect upon the reversal of the second one.

GUY and BIJUR, JJ., concur.

Judgment reversed, with thirty dollars costs, and complaint dismissed, with costs.

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SIGMUND WAGREICH and SAMUEL BRAGMAN, Respondents, *v.* MARY LE VIEN and "NORA" E. CONNER, Appellants.

(Supreme Court, Appellate Term, First Department, June, 1916.)

Service — proof of — Municipal Court of city of New York — process — jurisdiction — motions and orders — Municipal Court Code, § 129.

Upon a motion to open a default taken in an action brought in the Municipal Court of the city of New York the question raised by the allegations of the moving papers to the effect that the court had not obtained jurisdiction of the defendant by service of process is one of fact to be determined by the trial court "upon affidavit or otherwise" as provided by section 129 of the Municipal Court Code, and if the fact of non-service is disputed plaintiff must meet the issue by proof of service.

APPEAL by the defendants from an order of the Municipal Court of the city of New York, borough of Manhattan, second district, denying a motion to vacate a judgment.

Williams & Kohn (Louis B. Williams, of counsel), for appellants.

Louis Shoostoff (Morris Streusand, of counsel), for respondents.

Per CURIAM. The facts in this case are not disputed. By an order to show cause returnable on the 14th day of April, 1916, one of the defendants herein moved for an order asking that the judgment entered against her by default be vacated and set aside and also why she should not be allowed to interpose a defense. In the affidavit accompanying the moving papers she recited

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that she had never been served with process and had no knowledge or information of the existence of a judgment against her until the marshal called upon her with an execution. The facts thus testified to were not disputed. The plaintiff raised the preliminary objection that no proposed answer had been served, and the court denied the motion solely, as is stated in a stipulation contained in the record, upon that ground. The respondents claim upon this appeal that the motion was to open a default, under subdivision 2 of section 129, Municipal Court Code, and not a motion to vacate a judgment for non-service of process under subdivision 1 of said section and that was evidently the view taken by the lower court.

We see no reason why the defendant was prohibited from asking for any relief the facts might show that she was entitled to, and the first question to be determined by the court was raised by the allegations in the moving papers to the effect that the court had not obtained jurisdiction of the defendant by service of process. This question was one of fact to be determined by the court below: "Upon affidavit or otherwise." Mun. Co. Code, § 129. The vacation of the judgment was asked for as a matter of right and if non-service was disputed the plaintiff should have met the issue by proof of service. This was not even attempted and the testimony of the defendant stands uncontradicted.

Present: GUY, BIJUR and PHILBIN, JJ.

Order reversed with ten dollars costs and judgment vacated.

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MARY A. BERGEN, Plaintiff, v. MORTON AMUSEMENT COMPANY., INC., THOMAS S. SARTORELLI, CHARLES SHAFFER and EDWARD SHAFFER, Defendants.

(Supreme Court, Erie Special Term, June, 1916.)

Master and servant — when relation does not exist — negligence — contracts.

Damages — personal liability of owner excavating property — contracts.

City of Buffalo — provisions of section 73 of city ordinances — negligence.

Where the relation of master and servant or principal and agent does not exist, but an injury results from negligence in the performance of work by an independent contractor, the party with whom he contracts is not responsible for his negligence or that of his servant.

At common law the owner of land contiguous to that of another is entitled to the right of support, and when excavation is made and this right of support is taken away and damage results to the adjoining owner the owner making the excavation must make good the damage.

This natural right of support as between owners of contiguous lands existed in respect of lands only, and not in respect of buildings or erections thereon, but by statute (Laws of 1855, chap. 6) this duty of protection was extended to buildings and other erections in the city of New York.

The duty to properly protect the land or soil of contiguous property where excavations are made adjoining is an absolute one, and the owner of the property excavated cannot absolve himself from personal liability for damages resulting from inadequate protection against cave-ins by contracting with a third party for doing the work, and in such contract providing that the contractor shall properly shore and protect the adjoining property.

Section 73 of the ordinances of the city of Buffalo which provides that "In excavating to adjoining premises, where there is not existing a retaining wall at the time of such excavation and in excavating to line of street curbs for any building or other purpose, to a greater depth than four (4) feet from grade — the party causing such excavation shall sheet pile with plank two inches thick, extending full width and from

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grade to bottom of excavation. The party causing such excavation and placing such sheet piling shall replace all damaged work and material, in as good condition as it was before excavation was commenced," and which was passed by virtue of the provision of the charter of the city giving it power to prescribe general regulations for the erection of all buildings therein, is valid, and a violation thereof gives a cause of action.

Where in walking near premises being excavated for the owner by an independent contractor plaintiff was injured by a cave-in which resulted from failure to "sheet pile" the excavation, as required by said ordinance, plaintiff has a cause of action against the owner of the premises and his failure to obey the ordinance is some evidence of negligence to be considered by the jury with the other facts and circumstances of the case.

MOTION for a new trial after a verdict in favor of the plaintiff against the defendants Morton Amusement Company, Inc., and Thomas S. Sartorelli.

Goldring & Sherman, for plaintiff.

Elijah W. Holt, for defendant Amusement Company.

Philip A. Sullivan, for defendant Sartorelli.

Charles F. Boine, for defendants Shaffer.

WHEELER, J. The plaintiff recovered a verdict against the amusement company and the defendant Sartorelli, and these defendants now move for a new trial.

The action was to recover for personal injuries received under the following circumstances: The amusement company was the owner of a lot fronting on Connecticut street in the city of Buffalo. It proposed the erection of a theatre building on this property. Its president, who was an architect, prepared plans and specifications for its erection. The defendant Sartorelli made a written contract with the amuse-

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ment company to do the excavation and mason work according to the plans and specifications. The specifications provided that the contractor making the excavation should properly shore and protect the banks from giving way or falling in. Sartorelli, the contractor, made a sub-contract for the excavation work with the defendants Shaffer. This was an oral agreement. Sartorelli testified that this oral agreement with the Shaffers required that they, in turn, should properly shore the banks. The Shaffers claimed that nothing was said on that subject.

The Shaffers, however, proceeded with the work of making the required excavations for the building to be erected, and as the excavation progressed Sartorelli and his workmen went on putting in the foundation walls.

The Shaffers contended that at the time of the accident they had fully completed the excavation work, and turned it over to Sartorelli. This was disputed by Sartorelli on the trial.

The excavation in question was made close to the division line of the adjoining lot, and was some fourteen feet in depth at the point where the accident to the plaintiff occurred. On this adjoining lot stood two houses, one in front and one on the rear of the lot. A flagstone walk ran from the street to the rear house, and was laid about six inches from the lot line and excavation. The plaintiff and her husband occupied, as tenants, a portion of the house in front. On the day of the accident the plaintiff had returned home from a day's work, and was going along this walk toward the rear of the lot to get a basket belonging to her which had been taken back. While doing so, the bank underneath the flagging gave way, the stones dropped beneath her feet, and the plaintiff was thrown into the excavation, and fell against some piping which

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had been exposed by the digging. She received quite serious injuries; and for these this action was brought.

The evidence showed that the city of Buffalo had passed as one of its building ordinances one requiring a person, making an excavation of the depth this was, to properly shore and protect the banks by sheet-piling. The evidence further shows that this was the usual and customary way of guarding against cave-ins by those doing work of this character. It also appeared that the president of the amusement company, who was the architect in charge, and reserved to himself the right of general supervision, had observed that the excavation had not been properly shored, and two or three days prior to the accident had called Sartorelli's attention to the matter, and told him this work should be shored, and said in substance that if a rain came on the banks were likely to fall in. Thus the amusement company and Sartorelli had full notice of just what was likely to happen, and did happen. A hard rain came and softened the soil, and when the plaintiff passed over the walk it gave way, and the plaintiff was thrown into the excavation as stated.

In this connection, it should be noted that the contract between the amusement company and Sartorelli provided that if the contractor failed to keep or observe its provisions and requirements, that then the amusement company might intervene and do the things required or omitted.

The defendant amusement company contends that the verdict against it ought not to stand, upon the general rule of law that where the relation of master and servant or principal and agent does not exist, but an injury results from negligence in the performance of work by an independent contractor, the party with whom he contracts is not responsible for

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his negligence, or that of his servants. *Berg* v. *Parsons*, 156 N. Y. 109. And it is argued that, inasmuch as the contract between the amusement company and Sartorelli called for proper shoring of the banks by Sartorelli, the amusement company cannot be held responsible for the negligence of Sartorelli, or his subcontractors, in not observing the requirements of the agreement.

It is probably generally true that the owner is not responsible for the contractor's negligence, but only for his own. But can it be said in this case that the accident happened solely by reason of the negligence of the contractor, and that the amusement company was entirely blameless?

The court, in submitting this case to the jury, did not charge that the amusement company became responsible for the neglect or acts of either Sartorelli or of the Shaffers on the doctrine of principal and agent or *respondeat superior*, but left it to the jury to say whether the amusement company had itself been guilty of any negligence on its part. The question, therefore, remains whether the evidence and rules of law justified the court in submitting to the jury the question of the negligence of the amusement company.

What duty, if any, did the amusement company owe to the owner of the adjoining lot? By the common law, the owner of land contiguous to the land of another is entitled to the right of support, and when excavation is made and this right of support is taken away and damage results to the adjoining owner the owner making the excavation must make good the damage. *Dorrity* v. *Rapp*, 72 N. Y. 307; Jones Ease., §§ 585, 586; *Farrand* v. *Marshall*, 21 Barb. 409; *White* v. *Nassau Trust Co.*, 168 N. Y. 155; *Leerburger* v. *Hennessey Realty Co.*, 154 App. Div. 160; *Riley* v.

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Continuous Rail Joint Co., 110 id. 787; affd., 193 N. Y. 643; *Thurston* v. *Hancock*, 12 Mass. 221; Goddard Ease., 31.

This natural right of support as between owners of contiguous lands exists in respect of lands only and not in respect of buildings or erections thereon. *Dorrity* v. *Rapp*, 72 N. Y. 309, and cases cited.

By legislative enactment, however, this duty of protection was extended to buildings and other erections in the city of New York. Laws of 1855, chap. 6. The statute referred to has no application to the city of Buffalo, although there exists, and was introduced in evidence on the trial of this action, a city ordinance making it the duty of persons excavating below a certain depth to protect the embankment by sheet piling.

We think, however, in view of the decisions cited, the duty to properly protect the land or soil of contiguous property where excavations are made adjoining it is an absolute one, and that the owner of the property excavated cannot absolve himself from personal liability for damages resulting from inadequate protection against cave-ins by contracting with a third party for doing the work.

It has been held that under the act of 1855 (Laws of 1855, chap. 6) regulating the exercise by owners of land in the cities of New York and Brooklyn of the right of excavation upon their own lands, and requiring them to preserve from injury and to support any wall upon adjoining land standing upon or near the boundary line, the fact that an owner has contracted with another to make the excavation upon his land does not exempt the owner from the performance of the duty imposed by the act. *Dorrity* v. *Rapp*, 72 N. Y. 307; *Rosenstock* v. *Laub*, 140 App. Div. 467.

Does it not follow that where the common law imposes a like duty so far as the support of the soil

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itself on adjoining property is concerned, the owner will be held responsible for damages resulting from excavations, although he may have contracted with another to make the excavation, and in such contract provides the contractor should properly shore and protect the adjoining property? In principle, such a duty ought not to be escaped by delegation to another.

In the case of *Berg* v. *Parsons*, 156 N. Y. 115, the court points out certain exceptions to the general rule that where the relation of master and servant or principal and agent does not exist, but an injury results from negligence in the performance of work by a contractor, the person with whom he contracts is not responsible for his negligence or that of his servants. The court specifies among these exceptions cases where the employer personally interferes with the work, and acts done by him occasions injury; where the thing contracted to be done is unlawful; where the acts performed create a public nuisance; "*and where an employer is bound by a statute to do a thing efficiently and an injury results from its inefficiency.*" It will be noted that the last exception refers to things required to be efficiently performed "*by statute.*" We do not understand that the exception to the general rule is necessarily limited to things required to be efficiently performed "*by statute,*" but may also cover other situations where an active personal duty to see a thing properly done is cast on another. Such, we conceive, is the duty cast on the owner of property causing an excavation to be made next to or near adjoining lands.

The rule is illustrated by the case of *Deming* v. *Terminal R. Co., of Buffalo,* 169 N. Y. 1, and the numerous cases cited and discussed in the court's opinion. In that case, a railroad company, having been permitted to carry a highway over its tracks, was held

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liable for an injury occurring to a traveler on the highway resulting from the failure of an independent contractor, to whom the entire work had been let, to properly guard or lighten embankment made in the highway in the prosecution of the work, because its liability rested, not upon the negligence of the contractor, for which, under the doctrine of *respondeat superior,* the railroad would not be liable, but upon a breach of its duty to the public to keep the highway in a safe condition while the work progressed.

Here the liability of the amusement company is not predicated on the doctrine of *respondeat superior* for the negligence of Sartorelli, but for a breach of its duty to properly protect the excavation for the benefit of the owner and occupants of the adjoining property. Most instructive cases illustrating this general doctrine are to be found in *Hay* v. *Cohoes Co.*, 2 N. Y. 159, and *Sullivan v. Dunham*, 161 id. 290.

In the *Hay* case, a corporation dug a canal upon its own land for the purposes authorized by its charter. In so doing it was necessary to blast rocks with gunpowder, and the fragments were thrown against and injured the plaintiff's dwelling upon adjoining lands, and it was held that the defendant was liable for the injury, although no negligence or want of skill in executing the work was alleged or proved.

The rule laid down in *Hay* v. *Cohoes Co.* was approved in the case of *Sullivan* v. *Dunham*, 161 N. Y. 290, and was invoked, not in behalf of the owner of adjoining premises, but in behalf of a third person suffering personal injuries by blasting of stumps from an adjoining lot, and it was there, in turn, held that it was not essential for the plaintiff to establish negligence or want of skill in order to make out a cause of action. The court emphasized the general doctrine that " The use of land by the proprietor is not there-

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fore an absolute right, but qualified and limited by the higher right of others to the lawful possession of their property. To this possession the law prohibits all direct injury, without regard to its extent or the motives of the aggressor." *Hay* v. *Cohoes Co.*, 2 N. Y. 161.

In this case the trial court submitted the issues to the jury on the theory of negligence, and left it for them to say whether the accident to the plaintiff was caused by the negligence of the defendants or either of them. In this respect, the ruling of the trial court was perhaps more favorable to the defendants than they had the strict right to demand. The jury found, by their verdict, that both the amusement company and Sartorelli, the contractor, were guilty of negligence, and in this finding we think the evidence justified the verdict, for, as we have already pointed out, it appeared that the danger of the adjoining land caving in and falling was observed and known to the president of the amusement company, who was the supervising architect in charge of the work; that he called the attention of Sartorelli, the contractor, to the danger, and discussed it with him, and that although the contract between the amusement company and Sartorelli reserved to the amusement company the right to intervene and do the work itself, nothing was, in fact, done by any one until the accident happened.

In the foregoing discussion of the case, we have omitted from our consideration the force and effect of the ordinance of the city of Buffalo providing as follows:

"§ 73. In excavating to adjoining premises, where there is not existing a retaining wall at the time of such excavation and in excavating to line of street curbs for any building or other purpose, to a greater depth than four (4) feet from grade — the party caus-

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ing such excavation shall sheet pile with plank two inches thick, extending full width and from grade to bottom of excavation. The party causing such excavation and placing such sheet piling shall replace all damaged work and material in as good condition as it was before excavation was commenced."

The charter of the city gives the city power "To prescribe general regulations for the erection of all buildings in the city," etc.

It is contended by the defendants that the city council had no power or authority to pass the ordinance in question, and that it is, therefore, illegal and void, and can in no way affect or modify the duties or obligations of the defendants to the adjoining owner, or to third persons.

We are of the opinion, however, that the ordinance should not be condemned as illegal. Certainly the city has the power to prescribe the mode and manner of the construction of buildings within city limits in the interest of health and safety. No one will challenge that power. May it not also, by virtue of the same authority, and in the exercise of the general police power vested in a municipality, provide how excavations on lands shall be made for the safety and protection of the public, and those likely to suffer injury by the nonobservance of reasonable rules and precautions against accidents in the prosecution of the work? 28 Cyc. 736, and cases cited.

We think the city of Buffalo had such authority. If we are right in this conclusion, then it follows that a violation of the ordinance quoted in and of itself furnished a basis for the maintenance of this action.

Referring again to the case of *Berg* v. *Parsons*, 156 N. Y. 109, it is there laid down as a rule of law that one of the exceptions to the general rule exempting one from liability for the acts of an independent con-

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tractor is "where an employer is bound by a statute to do a thing efficiently, and an injury results from its inefficiency," and it follows that if the ordinance is valid then the amusement company causing the excavation to be made became liable for its improper shoring and protection.

The language of the ordinance is very similar to that employed in the legislative statute (Laws of 1855, chap. 6) relating to New York and Brooklyn, and it was held in *Dorrity* v. *Rapp*, 72 N. Y. 308, and *Rosenstock* v. *Laub*, 140 App. Div. 467, that the duty of properly protecting excavations was one resting on the owner, and that he is the party "*causing such excavation to be made*" within the meaning of the statute.

Certainly a failure to observe the requirements of the ordinance is some evidence of negligence, and that is what the court instructed the jury, saying in substance that they might take the violation of the ordinance into consideration with the other facts and circumstances of the case in determining whether or not the defendants, or any of them, were guilty of negligence.

We reach the conclusion that the motion for a new trial should be denied.

Motion denied.

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FREDERICK M. SULLIVAN AND ONE, Plaintiffs, v. JAY A. YOUNG, HATTIE M. YOUNG, His Wife, GOWANDA CO-OPERATIVE SAVINGS & LOAN ASSOCIATION, AND OTHERS, Defendants.

(Supreme Court, Erie Equity Term, June, 1916.)

Contracts — for building loan — must be in writing — mortgage — liens.

A contract for a building loan is an agreement by which one undertakes to advance to another money to be used in the erection of a building.

Where at the time of an advance of $1,500 on a bond and mortgage given to a savings and loan association to secure a loan of $5,500 on a half completed house nothing whatever was said or agreed upon as to how the money advanced should be used by the mortgagor, the transaction was not a contract for a building loan within the meaning of section 22 of the Lien Law which provides that such a contract must be in writing and duly acknowledged and within ten days after the execution thereof be filed in the office of the clerk of the proper county.

There being nothing in the agreement between the parties as to how the balance of the loan should be used, the case was covered by section 13 of the Lien Law which provides that "a lien for materials furnished or labor performed in the improvement of real property shall have priority * * * over advances made upon any mortgage or other incumbrance thereon after such filing" that is, filing of notice of lien.

ACTION to foreclose a mechanics' lien.

Thomas C. Burke, for plaintiffs.

Fred J. Blackmon, for the Gowanda Co-operative Savings & Loan Association.

WHEELER, J. The facts are undisputed. On September 23, 1915, Young contracted to purchase a lot

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on North Park avenue, Buffalo, from the Maher Development Company. In October he commenced the erection on the lot of a frame house to cost about $5,200. Between October 28, 1915, and December 29, 1915, plaintiffs, at Young's request, furnished lumber of the value of $1,007.52, which was used in the construction of the house. About January 6, 1916, Young ceased work on the house leaving it enclosed and ready for plastering. The estimated cost of completion is $2,400, so the house now is about one-half completed.

About the middle of December, 1915, the owner Young, through Howe & Howe, mortgage brokers, applied to the loan association for a loan of $4,000. On December 21, 1915, the appraisal committee accompanied by the secretary of the association inspected the property and found the house in process of construction, substantially in the condition in which it is today. They were told by Mr. Howe that the house would be similar to the building north of it, except that the finish on the second floor was to be oak, instead of Georgia pine.

The committee appraised the land at $1,400 and estimated the value of the building, when completed, at $5,200, or $6,600 in all. The report was presented to a meeting of the association on December 21, 1915, and passed. Nothing has been said as to when the money was to be advanced.

On January 7, 1916, Mr. Howe telephoned the secretary of the association and requested that the secretary send down a check for $1,500, as he, the secretary, had seen the property. The secretary sent Mr. Howe a check for that amount, payable to the order of Mr. Blackmon, the association's attorney. Mr. Howe took the check to Mr. Blackmon, who drew up a bond and mortgage for $4,000 in favor of the association and

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attended to their execution by Young. He then went to the office of Mr. Augspurger, who had a deed of the property from the Maher Development Company to Young, and where Young executed a second mortgage to the Buffalo Park Realty Company to secure part of the purchase price of the premises.

Then on the same day, January 7, 1916, Mr. Blackmon went to the county clerk's office and the deed to Young, the mortgage to the association and the second mortgage to the Buffalo Park Realty Company were placed on record. Mr. Blackmon thereupon advanced to Young the $1,500 sent in by the association. He paid the recording fees and other expenses of the loan, then the sum of $270.31 to the Maher Development Company on account of the purchase price of the lot, and the balance of $1,179.79 to Howe & Howe as representing Young.

No building loan agreement was signed or filed, and nothing was said as to when the balance of $2,500 represented by the mortgage was to be advanced.

On January 12, 1916, the plaintiffs filed in Erie county clerk's office a notice of lien against the interest of the owner, Jay A. Young, in the premises in question, and on January 29, 1916, they filed a notice of lien against the interest of the mortgagee, Gowanda Co-operative Savings and Loan Association, in the premises.

The plaintiffs seek to subordinate the mortgage in question and make it inferior to their lien.

The section of the Lien Law relied on, reads as follows:

"Sec. 22. Building loan contract. A contract for a building loan, either with or without the sale of land, and any modification thereof, must be in writing and duly acknowledged, and within ten days after its execution be filed in the office of the clerk of the county in

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which any part of the land is situated, and the same shall not be filed in the register's office of any county. If not so filed the interest of each party to such contract in the real property affected thereby, is subject to the lien and claim of a person who shall thereafter file a notice of lien under this chapter." Laws 1909, chap. 38.

The plaintiff seeks to subject the mortgage above set forth to the liens of the parties to this action filing mechanics' liens against the mortgaged property by virtue of the provisions of this section, on the theory that there was a contract between Young and the savings and loan association, for a building loan within the meaning of this section.

In our opinion, the transaction or transactions between Young, the mortgagor, and the Gowanda Co-operative Savings and Loan Association do not come within the provisions of section 22 of the Lien Law in reference to so-called building loan contracts.

Without undertaking to give a comprehensive definition of what constitutes a "*contract for a building*" loan, as used in the section, it is perhaps sufficient to say that its ordinary and usual meaning is to describe an agreement by which one undertakes to advance to another money to be used in the erection of a building.

The section quoted was simply intended to provide that where such an arrangement exists the parties to it shall acquire thereby no rights or equities superior to those who might file mechanics' liens, as provided in this chapter, unless the contract for a building loan was executed in writing and duly acknowledged and recorded with the clerk of the county, as required by the act.

It will be noted that the section in question makes no mention of mortgages, or the effect of the giving and

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recording of a mortgage. Its operation is confined to *contracts for building loans.*

In order that there may be any valid contract for a building loan, by the very terms of the act such contract must be in writing, and acknowledged, so as to entitle it to be recorded. If any such agreement rests in parol, it is invalid and of no effect, and constitutes in law no contract whatever for a building loan.

The bond and mortgage given by Young to the savings and loan association was not tantamount to a contract for a building loan. We shall see this bond and mortgage falls under the provisions of another section of the act. The bond and mortgage and the transactions connected with its giving, and the advancement of money under it, cannot in any fair sense be termed either a written or a verbal contract for a building loan.

When the mortgage was given, and the $1,500 advanced, nothing whatever was said or agreed as to how the money should be used. There was no agreement whatever that it should be used either to pay off existing obligations of the mortgagor, incurred in the erection of the houses on the property, or expended by him in finishing the same. The mortgagor was at liberty to use this money just as he saw fit. He might, so far as any agreement with the savings and loan association is concerned, have used the $1,500 received in paying gambling debts. The same is true as to balance of the mortgage which remained unadvanced. There was nothing in the agreement between the parties as to how this balance should be used. Consequently we hold there never was any contract for a building loan between Young and the savings and loan association. The arrangement between them was simply for a straight mortgage on the security of the property, to the extent of $4,000, of which sum $1,500

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was advanced when the mortgage was executed and recorded.

Section 13 of the Lien Law covers such a case, and this provides that: "A lien for materials furnished or labor performed in the improvement of real property shall have priority * * * over advances made upon any mortgage or other incumbrance thereon after such filing "; that is, filing of notice of lien.

That is this case, and all there is of this case. If the savings and loan association should make any further advances on account of its mortgage, as to those advances its mortgage would be a lien subsequent and inferior to the mechanics' liens filed by the parties to this action.

As to the $1,500 advanced at the time of giving the mortgage, the mortgage constitutes a lien prior and superior to the mechanics' liens filed.

Consequently, the relief prayed for in this action against the savings and loan association must be denied, with costs to said association as against the plaintiff.

Ordered accordingly.

COUNTY OF ERIE, Plaintiff, *v.* TOWN OF TONAWANDA, Defendant.

(Supreme Court, Erie Special Term, June, 1916.)

Taxes—Tax Law, § 24—who entitled to money collected for taxes on stock of bank—actions—municipal corporations.

Under section 24 of the Tax Law a city, which in and of itself is a tax district within a county, is alone entitled to the money collected for taxes on the stock of a bank located within said city.

A contention that as the complaint in an action by the county against the town in which the city was located to recover cer-

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tain moneys erroneously paid to defendant upon a distribution of the amount paid for taxes on the stock of a bank located in said city alleged that said moneys were paid to the town voluntarily through inadvertence and mistake of law, they could not be recovered back, was untenable under the doctrine that voluntary payment cannot be invoked by a defendant to enable him to retain the money of a municipality illegally paid to him.

Under said section 24 of the Tax Law the county had such a special interest in the moneys so erroneously paid to the town that it could maintain an action to recover the amount so paid which legally belonged under the statute to the city in which the bank was located.

DEMURRER to the plaintiff's complaint by defendant.

Riordan & Batt in support of demurrer.

Carleton H. White and Asher B. Emery opposed.

WHEELER, J. The plaintiff in this action seeks to recover from the defendant the amount of certain moneys erroneously paid the town upon a distribution of certain moneys collected for bank taxes on the stock of a bank located in the city of Tonawanda.

The complaint alleges that during the years 1909 to 1913, inclusive, the assessors of the city of Tonawanda assessed the capital stock of the First National Bank of the city of Tonawanda in the manner prescribed by law, and thereafter pursuant to law the board of supervisors of Erie county fixed the amount of taxes payable on said shares of stock in each of said years, and issued their warrant to the county treasurer as prescribed by law, commanding said treasurer to collect said taxes imposed upon said shares of stock; that said taxes so levied were collected for each of said years and secured by the county treasurer; that the board of supervisors of said county thereupon issued each year to the county treasurer their warrant directing him to pay

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an amount equal to said amount collected less his commissions of one per cent, a certain proportion to the town of Tonawanda and a certain proportion to the city of Tonawanda, specifying the amount so to be paid in each year; and that the treasurer, pursuant to such directions, did pay to the town of Tonawanda the sums specified. That inasmuch as the city of Tonawanda was and is a tax district in and of itself the town of Tonawanda had and has no legal right to share in the distribution of said money collected for said bank taxes, and that the payments made to said town were unlawfully made "through inadvertence and mistake of law." That none of those moneys have ever been repaid and the county of Erie demands judgment against said town for the amount of said illegal payments amounting to the sum of $2,522.49, besides interest.

The defendant demurs to the complaint on the ground: first, that the plaintiff has no legal right to sue for the recovery of this amount in that on the face of the complaint the moneys in question belong to the city of Tonawanda and not the plaintiff; and, second, that the complaint does not state facts sufficient to constitute a cause of action. The statute providing for the assessing and collecting of taxes on shares of bank stock is section 24 of the Tax Law.

Prior to the decision in the case of *City of Utica* v. *Board of Supervisors,* 109 App. Div. 189, it was supposed by many that the moneys received from bank taxes were to be distributed as they were in this case, but it was held in the case cited that the city alone was entitled to the bank taxes paid. This case was followed in later cases. *City of Buffalo* v. *County of Erie,* 88 Misc. Rep. 596; *People ex rel. Village of Cobleskill* v. *Board of Supervisors,* 140 App. Div. 769; *People ex rel. Lawyer* v. *Board of Supervisors,* 39

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Misc. Rep. 162; *People ex rel. City of Geneva* v. *Board of Supervisors,* 188 N. Y. 1.

There remains no question therefore but that the city of Tonawanda under the decisions of the court is entitled ultimately to recover payment of the moneys sought to be recovered in this action. The defendant here, however, contends that inasmuch as it is alleged in substance in the complaint that these moneys were paid the town voluntarily through inadvertence and mistake of law they cannot now be recovered back.

The general rule of law is stated by Pomeroy in his work on Equity Jurisprudence and is in these words: "The doctrine is settled that, in general, a mistake of law, pure and simple, is not adequate ground for relief. Where a party with knowledge of all the material facts, and without any other special circumstances giving rise to an equity in his behalf, enters into a transaction affecting his interests, rights and liabilities, under an ignorance or error with respect to the rules of law controlling the case, courts will not in general relieve him from the circumstances of his mistake." See also *Newburgh Sav. Bank* v. *Town of Woodbury,* 173 N. Y. 55; *Payne* v. *Witherbee, Sherman & Co.,* 200 id. 572.

There are, however, exceptions to this general rule, and one of these exceptions arises in cases where unauthorized payments are made or acts are done by municipal or governmental authorities. It has been held repeatedly in well considered cases that the doctrine of voluntary payment cannot be invoked by a defendant to enable him to retain money of a municipality illegally paid to him. As was said by the court in *Village of Fort Edward* v. *Fish,* 156 N. Y. 374: "That doctrine applies to individuals who have power to do as they wish with their own, but it does not apply to an agent of a municipal corporation, who pays out

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its money without power, to one who accepts it with knowledge. The statute forbade the payment from the funds of the water board, and action forbidden by statute is void. A void act is no act, and a void payment is no payment. Such a payment is not voluntarily made by the corporation, but by its agent, in excess of his authority and in defiance of its rights. It is not the act of the corporation itself, but of one, without authority, who assumed to act for it." Citing *People* v. *Fields,* 58 N. Y. 491–505; *Board of Supervisors* v. *Ellis,* 59 id. 620; *Lyddy* v. *Long Island City,* 104 id. 218; *People ex rel. Coughlin* v. *Gleason,* 121 id. 631; *Surdam* v. *Fuller,* 31 Hun, 500. See also *Wadsworth* v. *Supervisors,* 217 N. Y. 501; *People* v. *Journal Co.,* 213 id. 8.

Cases might be multiplied — it is entirely unnecessary. The distinction in cases of voluntary payments between individuals and municipalities is too well recognized. We must, therefore, overrule the contention that the payment to the town was in law a voluntary one, and for that reason the moneys secured by it cannot be recovered in this action.

We now address ourselves to the further ground of demurrer urged by the defendant town that the plaintiff has no legal capacity to maintain this action for the reason that the moneys sought to be recovered are the property of the city of Tonawanda and not of the county of Erie, and, therefore, the action should be prosecuted by the real party in interest and not by this plaintiff. It would seem that under the provisions of the Tax Law relating to the taxation of bank shares the county in a certain sense acts as the collecting agent of the taxes assessed and paid, and when paid holds the moneys collected in trust for the benefit of those to whom they should go under the provisions of the act. The county treasurer acts as the custodian of

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the funds for the county and pays them out upon the warrant or order of the board of supervisors to the political subdivisions to whom they become payable. A failure to make the proper distribution and payment according to law renders the county liable to these political subdivisions which have a right to claim the same. These provisions show that until the proper distribution has been determined and the proper warrants or orders for their payment have been made the county is in legal effect rightfully entitled to the possession and control of the bank taxes paid and in effect holds them in trust for the parties ultimately entitled to them. We are unable to discover any good or sufficient reason why in case the county by any means is wrongfully deprived of these moneys it cannot recover the same from those receiving the funds to the end that it may carry out the purposes and directions of the statute. Suppose the county treasurer without commingling these bank tax moneys with the general funds of the county had misappropriated the moneys and converted them to his own use. Can there be a question that the county could maintain an action against the treasurer and his official bondsmen to recover the moneys so misappropriated? This principle applies equally where the moneys have been illegally paid out by the county agents as where the agent or servant has feloniously misappropriated the funds. In other words, the county has the right to follow the funds into the hands of those illegally receiving them. The county remains liable to the political subdivision entitled to the moneys on a proper distribution, and in all justice it ought in turn to have the right of recovery against those wrongfully and illegally receiving those funds.

We think the county had such a special interest in the fund that it can maintain this action. The case

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presented, it seems to us, is not altogether unanalogous to the relation existing between a bank and those having funds on deposit with it. In a certain sense it is said the money deposited belongs to and is the property of the depositor; nevertheless in legal effect the funds deposited are commingled with the general funds of the bank and the depositor has simply a right of action against the bank if it fail to pay when requested. When the bank taxes are recovered by the county I do not think it was the purpose or requirement of the statute that the county should keep the particular moneys intact, separate and distinct from all other moneys in the hands of the county treasurer. It would seem that he would meet every requirement of law if he should deposit them in a bank with other moneys to his credit as county treasurer and be prepared to meet and honor the orders or warrants of the board of supervisors when a determination had been reached by that board as to the proper division and distribution of the bank taxes received.

If this view be correct, it disposes of the contentions of the defendant. The county was the technical owner of the fund, holding it as trustee and charged with the duty of properly distributing it to others entitled ultimately to receive it pursuant to the direction of the statute. Thus the county became and remained the real party in interest and the one entitled and obligated to bring and prosecute this action.

These considerations clearly distinguish this case from that of *People* v. *Ingersoll*, 58 N. Y. 1.

I am, therefore, of the opinion that the defendant's demurrer must be overruled, with costs, with the right of said defendant to answer within twenty days after service of the interlocutory judgment to be entered hereon and the payment of the costs taxed.

Ordered accordingly.

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ROYAL INDEMNITY COMPANY, Appellant, v. INTERNATIONAL RAILWAY COMPANY, Respondent.

(Supreme Court, Erie Special Term, June, 1916.)

Automobiles — insurance against loss or damage caused by collision — damages — actions — negligence.

A policy insuring an automobile against loss or damage caused by collision provided that the insurer should be subrogated to all rights which the insured might have against any one by reason of loss or damage to the machine, and after it had been damaged in the collision through the admitted negligence of defendant, a street railway company, the insurance company settled with the owner who by a written instrument assigned and transferred to it all claims for damage to the machine subrogating the insurer to all his rights against defendant in that regard. In an action brought by the insurance company against the railway company to recover for damages to the machine, held, that a release of the claim therefor given by the owner to the defendant who had actual notice of the assignment was not valid as against plaintiff though it had not given formal notice thereof to defendant.

While separate actions, one for damages to property and another for personal injuries, may be brought by the same party it is customary to join such demands in one action, and the fact that the owner of the automobile brought an action against the street railway company to recover for personal injuries was a circumstance sufficient to put it upon inquiry as to what had become of the claim for damages to the automobile.

APPEAL from judgment of the City Court of Buffalo dismissing the plaintiff's complaint.

Clinton B. Gibbs, for appellant.

Norton, Penney, Spring & Moore (Harold S. Brown, of counsel), for respondent.

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WHEELER, J. One J. F. Kulp was the owner of an automobile. The plaintiff issued to him a policy of insurance in which, among other things, the insurance company agreed to indemnify the insured against loss or damage to his automobile caused by collision. During the life of the policy, Kulp had a collision with a street car of the defendant, in which the automobile was damaged, and he, himself, sustained certain personal injuries. The insurance company settled with Kulp for the damage to the automobile.

The policy of insurance provided, among other things, that the insurance company should be subrogated to all the rights which said Kulp might have against any other person or other entity by reason of loss or damage, and that the insured should on request execute any and all papers necessary to secure to the insurance company such rights. Accordingly, on the adjustment and settlement of the damages to the automobile, Kulp, by an instrument in writing, duly assigned and transferred to the insurance company any and all claims and demands which he had or might have against others by reason of the damage to said automobile, and subrogated the insurance company to his rights against said parties, expressly reserving from the operation of such assignment any claim he might have against any person or corporation for personal injuries sustained in said collision.

Subsequently Kulp began an action in the Supreme Court against the International Railway Company to recover for his personal injuries, on the ground of the alleged negligence of that company. This cause came on for trial, and before its termination the parties to that action settled the same out of court.

The International Railway Company on that settlement procured Kulp to execute to it a formal written release. This release was upon a printed blank used

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by that company, and by its terms released the railway company from all claims or demands which said Kulp had "or may at any time heretofore have had * * * *either to person or property,* by reason of said collision" and "for which an action is now pending in the Supreme Court, Erie County, which is to be discontinued."

Doubtless this release is broader in its terms than was intended, and that it was simply the purpose of the parties to it to release the claim for personal injuries, when, in fact, it, in form, released those to "property" as well.

This, however, is not an action to reform the release, and on this appeal we must accept the release as we find it.

Subsequently the insurance company began this action in the City Court of Buffalo to recover the damages sustained to the automobile (which claim had been assigned to it as stated), on the ground of the alleged negligence of the railway company in causing the collision. The defendant set up and proved the release to the railway company as a bar to the action.

The International Railway Company admitted that its negligence caused the collision; but the trial court dismissed the plaintiff's complaint on the express ground that the plaintiff had failed to give notice to the railway company of the assignment to the plaintiff of the cause of action alleged in the complaint prior to the execution and delivery by Kulp of his release to the railway company, and that therefore such release constituted a complete bar to any recovery in this action.

In this disposition of the case, I am of the opinion that the trial court erred, for the reason that the evidence in the case shows that even though the insurance company may not have given formal notice

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of the assignment to it, nevertheless the railway company had actual notice of its existence, and did not act in ignorance of its existence, or of the claim of the insurance company.

It is undoubtedly the law that where a settlement is made in ignorance that a claim or demand has been assigned (except in cases of negotiable instruments) such a settlement will fully protect the party making it from the demands of the assignee. *Heermans* v. *Ellsworth,* 64 N. Y. 159.

But in this case I am of the opinion that the railway company had actual notice. The plaintiff called as a witness in its behalf in the trial in the court below the attorney and counsel for Kulp who brought and tried his action for personal injuries in the Supreme Court, and who negotiated the settlement of the case then on trial with the claim adjuster of the railway company. He testified, in substance, to his connection with the personal injuries action and its settlement, which, so far as the talk leading up to it is concerned, related entirely to the action for personal injuries he had in charge. That he told the adjuster he would settle the suit for $3,000, and the adjuster told him the company would pay that sum; that in the course of that conversation the adjuster stated to him: " That there was a claim against the company for damages to the automobile * * * " and that the adjuster said: " If he settled this case with me he wanted me to be neutral on the claim, whoever had the claim — it was some insurance company I think — for damages to the automobile; that is, he didn't want me to aid them. We had collected considerable testimony, and I believe Mr. Farrell asked me for the names of my witnesses so they would be available to him for the suit which I understood was to come up in the City Court as to the claim for damages. * * * I remember Mr. Farrell

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spoke to me about another suit pending, and he wanted me to be neutral in the matter, and I told him I would be. I told him I would not assist the insurance company."

This testimony was not in any way contradicted. In fact, the defendant offered no evidence whatever on the trial. We must assume the evidence true.

The only fair inference to be drawn from this testimony is that the railway company had knowledge that a claim for damages to the automobile was outstanding and held by the insurance company, or someone else than Kulp; and that it was further understood that the settlement with Kulp for personal injuries would not dispose of the claim for damages to the automobile; otherwise there was no occasion for any understanding with the counsel trying the action for personal injuries that when the claim for damages to the automobile came on that he would not assist the holder of that claim.

While, doubtless, separate actions, one for damages to property, and another for personal injuries, might be brought by the same party, nevertheless it is customary to join such demands in one action, and the fact that Kulp's action against the railway company was simply for personal injuries was a circumstance in and of itself sufficient to put the railway company on inquiry as to what had become of the claim for damages to the automobile.

It is claimed by the defendant that nothing short of actual notice, given by the insurance company or by Kulp, of the assignment by Kulp to the insurance company would accomplish the purpose.

I do not concur in this contention. It is sufficient that the defendant had knowledge that the assignment had been made, or had knowledge of facts sufficient to put it upon its inquiry. If it had such knowledge, no

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matter from what source the information came, it cannot claim to have acted innocently in settling for the property damages with Kulp. *Brewster* v. *Carnes*, 103 N. Y. 556.

In its last analysis it will be found that the rule giving a party the benefit of a settlement made in ignorance of an existing assignment is based on the doctrine of estoppel. No such benefit can or ought to be given where a party acts with knowledge, and in defiance of others' rights undertakes to negotiate some settlement for the very purpose of defeating them. The rule is that where a purchaser has knowledge of any fact sufficient to put him upon inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such superior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered a *bona fide* purchaser. *Williamson* v. *Brown*, 15 N. Y. 354; *Anderson* v. *Blood*, 152 id. 293; *Sweet* v. *Henry*, 175 id. 275; *Kingsland* v. *Fuller*, 157 id. 511.

This is true whether a party purchases a release from liability for damages, or is purchasing a piece of real estate.

The judgment should be reversed and a new trial had in the City Court. Costs of this appeal to abide the event.

The appellant asks this court to render final judgment for the plaintiff, which this court has doubtless the power to do under the recent amendment to the City Court Act, but we think it better, in view of all the circumstances, and the fact that the defendant relied on a defense which did not avail, to give the defendant the benefit of a new trial.

Judgment reversed and new trial ordered.

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CHARLES NAUD, Plaintiff, v. KING SEWING MACHINE COMPANY, Defendant.

(Supreme Court, Erie Special Term, June, 1916.)

Workmen's Compensation Law, §§ 10, 20— hazardous employments — pleading — what states a cause of action — negligence.

Section 10 of the Workmen's Compensation Law after specifying what are to be deemed hazardous employments provides: "Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an *accidental* personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of said injury."

Held, that a complaint alleging in substance that the defendant negligently failed to furnish and provide the plaintiff while in its employ "with reasonably safe implements, appliances, ventilators, fans, blowers or other devices * * * for the carrying away of poisonous and dangerous gases and fumes; in permitting and allowing poisonous gases and fumes to accumulate and remain in and about the place in which this plaintiff was required to work, * * * and through the carelessness and negligence of defendant" in other ways failing and neglecting to perform certain alleged duties for the proper and reasonable safety of the plaintiff, whereby it is alleged the plaintiff inhaled certain poisonous gases and fumes, which occasioned permanent injuries to his lungs and other portions of his body, states a cause of action.

Under section 20 of the Workmen's Compensation Law which requires the commission to determine the claim before it for compensation and declaring that its decision shall be final as to all questions of fact a finding that injury to the plaintiff was not due to accident is *res adjudicata* as to the fact as to whether the injury was accidental and precludes further inquiry on the point.

If the compensation commission was in error in making the finding as to whether plaintiff's injury was accidental, his only remedy was an appeal from such decision as provided by section 23 of said law.

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DEMURRER by the plaintiff to a portion of the defendant's answer to the plaintiff's complaint.

Jacobson & McCormick, for plaintiff in support of demurrer.

Clinton B. Gibbs, for defendant, opposed.

WHEELER, J. The complaint sets forth a cause of action for alleged negligence under the Employers' Liability Act of this state. It alleges in substance that the defendant negligently failed to furnish and provide the plaintiff while in its employ " with reasonably safe implements, appliances, ventilators, fans, blowers or other devices * * * for the carrying away of poisonous and dangerous gases and fumes; in permitting and allowing poisonous gases and fumes to accumulate and remain in and about the place in which this plaintiff was required to work, * * * and through the carelessness and negligence of defendant " in other ways failing and neglecting to perform certain alleged duties for the proper and reasonable safety of the plaintiff, whereby it is alleged the plaintiff inhaled certain poisonous gases and fumes, which occasioned permanent injuries to his lungs and other portions of his body. It is not necessary to go into further details as to the allegations of the complaint.

In its answer, the defendant makes certain denials of the allegations of the complaint, and alleges that the alleged injuries received by the plaintiff were due to the risks incident to his employment and known to him and that such risks were assumed by the plaintiff. Then follows the following allegation, to wit:

" *Fifth.* For a further and separate defense herein the defendant alleges, upon information and belief, that the same plaintiff heretofore and on or about the

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2nd day of February, 1916, in accordance with the provisions of the Workmen's Compensation Law of the State of New York, presented to defendant the alleged claim referred to in the complaint for compensation according to the benefits described in said Workmen's Compensation Law for said alleged injury claimed to have been sustained by him in the course of his said employment with the defendant, and that thereafter said State Workmen's Compensation Commission, and on or about the 29th day of March, 1916, after a hearing duly had thereon, adjudged that the alleged accident claimed to have been sustained by the said plaintiff did not constitute an accident and adjudged that plaintiff's said alleged claim be disallowed; and that by said judgment this action became and was forever barred and foreclosed."

To this clause or portion of the defendant's answer the plaintiff demurs on the ground that the said defense is insufficient in law. It was conceded in the argument of this demurrer that the employment in which the plaintiff was engaged at the time he received the alleged injuries was one of the hazardous employments covered by the provisions of the Workmen's Compensation Law.

If the plaintiff's injuries were in fact occasioned owing to the negligence of the defendant in the particulars specified in his complaint, it is difficult to see why the plaintiff should not have been given compensation under the provisions of the Workmen's Compensation Law.

After specifying what are to be deemed hazardous employments section 10 of the act provides that:

"Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee

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resulting from an *accidental* personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury," except in cases of injuries resulting from intoxication or those wilfully and intentionally inflicted.

We fail to see therefore, if the allegations of the complaint are true, that the plaintiff's injuries were the result of the defendant's negligence, why the plaintiff was not fairly entitled to compensation for his injuries under the provisions of the Compensation Act, as a " disability * * * *resulting from an accidental injury,* * * * arising out of and in the course of his employment." *Matter of Jensen* v. *Southern Pacific Co.*, 215 N. Y. 514; *Matter of Winfield* v. *N. Y. C. & H. R. R. R. Co.*, 216 id. 284; *Connors* v. *Semet-Solvay Co.*, 94 Misc. Rep. 406.

An " *accidental injury* " as used in this statute is clearly distinguishable from an injury in the nature of a vocational disease, sustained in the course of an employment, where from the inherent nature of the work disease is likely to be contracted. " *Accidental* " has been defined as " happening by chance, or unexpectedly taking place, not according to the usual course of events: casual; fortuitous." *North America Life & Accident Ins. Co.* v. *Burroughs*, 69 Penn. 43; 8 Am. Rep. 212.

In insurance policies providing for an indemnity, " *accidental* " cause is defined as " an event happening without human agency, or, if happening through human agency, an event which under the circumstances is unusual, and not expected to the person to whom it happens."

Within these recognized definitions of the word " accidental," if the injuries sustained by the plaintiff were occasioned in the manner alleged in the com-

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plaint, they were clearly "*accidental*" within the meaning of the Workmen's Compensation Law; and the plaintiff would have been entitled to compensation as provided in that act.

When therefore the compensation commission found and determined, after a hearing, that the plaintiff's injuries were not the result of an "accident" it found by necessary implication, that such injuries were not due to the defendant's negligence, or occasioned as alleged in the complaint.

The importance and legal significance of this adjudication by the compensation commission arises out of the fact that by the provisions of section 20 of the Compensation Law the commission is required to determine the claim made before it for compensation, after notice to the interested parties, and an opportunity to present evidence and be represented by counsel. The act then declares that "*The decision of the commission shall be final as to all questions of fact, and, except as provided in section twenty-three, as to all questions of law.*"

Therefore it is that the holding of the commission that the plaintiff's injuries were not due to "*accident*" makes that question *res adjudicata* as to the plaintiff and the defendant in this action, and precludes a further inquiry into the questions of fact in this action.

The adjudication of the compensation commission was therefore properly set up in the answer of the defendant, as bar against the plaintiff in an effort to establish in this action that his injuries were occasioned by the negligence of the defendant, which our interpretation of the act would constitute an "accidental injury."

If the compensation commission was in error on the decision of the application made to it, the plaintiff's

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remedy was to appeal from its decision to the Appellate Division of this court, as provided in section 23 of the Compensation Law.

I am therefore of the opinion that the demurrer of the plaintiff to the fifth clause of the defendant's answer should be overruled, with costs of this demurrer.

Demurrer overruled, with costs.

THE PEOPLE ex rel. NELLIE SCHINDLER, Relator; *v.* HARRY KAISER, Keeper of the Erie County Penitentiary, Respondent.

(Supreme Court, Erie Special Term, June, 1916.)

Habeas corpus — writ of — when denied — Liquor Tax Law.

Where on conviction in a County Court of a violation of the Liquor Tax Law the relator was sentenced to a term of one year in the penitentiary and to pay a fine, which was paid the same day, and the execution of the sentence of imprisonment suspended, and more than six months thereafter relator was arrested upon a warrant issued by the county judge and brought before the court which made an order that the order theretofore made suspending the execution of the sentence of imprisonment be revoked and relator committed to the penitentiary to serve for a period of one year as directed by the original sentence, and it appears that the course pursued by the court wholly ignored the whole scheme of probation as outlined in the statute, it must be concluded that relator was given the benefit of only a common-law suspension of the execution of the sentence and not one under the statute, and that upon revocation of said sentence it only remained to carry out the terms of the original judgment of conviction and that relator's application on habeas corpus for release from imprisonment, on the ground that the term thereof had expired, must be denied and the writ dismissed.

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PROCEEDING by habeas corpus for the release of the relator from imprisonment on the ground that the term of her imprisonment has expired.

Frank A. Abbott, for relator.

Burt A. Duquette, District Attorney of Niagara county, opposed.

WHEELER, J. The relator was convicted on her plea of guilty at a term of the Niagara County Court on the 29th day of May, 1915, of a violation of the Liquor Tax Law of the state of New York, and was therefore sentenced "To be confined in the Erie County Penitentiary for the period of one year, and to pay a fine of two hundred dollars."

The judgment of conviction contained this further entry or words: "*Execution of the penitentiary sentence is suspended. Fine paid May 29, 1915.*"

The relator was released from custody, but was again on the 6th day of January, 1916, arrested upon a warrant issued by the county judge, and brought before the court and on the 8th day of January, 1916, the County Court made an order "that the order heretofore made by this Court suspending the execution of the penitentiary sentence as aforesaid be and the same is revoked, and said defendant, Nellie Schindler, is hereby committed to the Erie County Penitentiary to serve for the period of one year as directed by said sentence so pronounced as aforesaid, upon judgment of conviction herein."

The order recites that the County Court was moved to take this action owing to certain alleged violations of the Penal Law of the state.

The relator was accordingly incarcerated in the penitentiary, and there is no question as to the power of the court to suspend the execution of a sentence

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after it has been passed. *People ex rel. Forsyth* v. *Court of Sessions,* 141 N. Y. 288; *People* v. *Webster,* 14 Misc. Rep. 617; *People* v. *Goodrich,* 149 N. Y. Supp. 406.

This power it is said exists at common law arising from the inherent power of the court over its own decrees. *People* v. *Goodrich,* 149 N. Y. Supp. 483; *People ex rel. Forsyth* v. *Court of Sessions,* 141 N. Y. 288.

In addition to the common law right certain rights are expressly conferred by statute to be found in section 483 of the Code of Criminal Procedure. An examination of this section and of its subdivisions shows that the precise case here presented is not covered. Subdivision 1 of the section relates to the suspending of sentence rather than to the suspension of the execution of the sentence after it has been pronounced. Section 2 relates to cases where "the judgment is to pay a fine and that the defendant be imprisoned until it is paid" which is different from one where the sentence provides both for the payment of a fine and *imprisonment.* Section 3 relates to the transfer of the supervision of the probationer from one county to another. Then comes subdivision 4 of the section which has been quoted at length:

"4. At any time during the probationary term of a person convicted and released on probation in accordance with the provisions of this section, the court before which, or the justice before whom, the person so convicted was convicted, or his successor, or the court to which the person on probation is transferred as hereinabove provided, may in its or his discretion, revoke and terminate such probation. Upon such revocation and termination, the court may, if the sentence has been suspended, pronounce judgment at any time thereafter within the longest period for which the

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defendant might have been sentenced, or, if judgment has been pronounced and the execution thereof has been suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect for its unexpired term."

It will be noted this clause provides that at any time during the probationary term of a person "*released on probation in accordance with the provisions of this section*" the court may "revoke and terminate such probation" and upon such revocation "*if the judgment has been pronounced and the execution thereof has been suspended, the court may revoke such suspension whereupon the judgment shall be in full force and effect for its unexpired term.*"

There appears therefore to be good and sufficient reasons why the relator cannot avail herself of this latter provision quoted. *First,* because the sentence imposed on her was not suspended by virtue of the provisions of section 483, but under the common law power possessed by the court. *Second,* because the revocation and subsequent procedure of the court prescribed by the section relates only to persons "*released on probation in accordance with the provisions of this section,*" which necessarily excludes persons released by the suspension of execution of sentence under the common law power of the court. This is true even though we were to regard the suspension of the execution of the sentence as tantamount to putting the relator on probation. As matter of fact, however, we do not think the relator can be said to have been put on probation during the suspension of the execution of the sentence.

The judgment of conviction and the suspension of its execution makes no mention whatever of any probation of the relator. Indeed the course pursued by the court before whom she was convicted wholly ignores

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the whole scheme of probation as outlined in our statutes. Section 11A of the Code of Criminal Procedure authorizes the appointment of probation officers, subdivision 2 defines their duties, and subdivision 4 provides that when any court suspends sentence and places a defendant on probation it shall determine the conditions and period of probation.

In a certain sense it probably can be said that any person convicted and by order of the court set at liberty, subject to the right of the court for any reason to revoke its order, is at liberty on probation. We take it, however, that when the word "*probation*" is used in the statute it has reference to the general scheme of probation established and authorized by statute, where the probationer is expressly made subject to the control, direction and discipline of the court through probation officers or otherwise as prescribed in the statute law.

Subdivision 2 of section 483 also provides that in cases arising under that section the court "shall place such defendant on probation under the charge and supervision of a probation officer during such suspension." None of these things were done in the case at bar.

We, therefore, must conclude that the relator was given the benefit of only a common-law suspension of the execution of the sentence, and not one under the statute, and when the suspension was revoked it only remained to carry out the terms of the original judgment providing for a year's imprisonment.

The writ is, therefore, dismissed and the prisoner remanded to the keeper of the Erie County Penitentiary to be by him retained in custody until the expiration of the year's imprisonment named in the original judgment.

Ordered accordingly.

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HENRY WILLIS, as a Stockholder, etc., Plaintiff, *v.* THE CITY OF ROCHESTER et al., Defendants.

(Supreme Court, Monroe Special Term, June, 1916.)

Railroads — street — municipal corporations — right to fix fare — power of legislature.

The regulation of street railroads in cities, including the fare thereon, being germane to the powers and functions of municipal governments, the legislature has power, in an act amending the charter of a city generally, annexing to the city territory in which a street railroad is wholly situated, to fix the rate of fare on such railroad so as to provide for a five-cent fare for a continuous ride in the city.

(Syllabus by the Court.)

MOTION by plaintiff for judgment on the pleadings.

This action was brought by the plaintiff as a stockholder in the Rochester Electric Railway Company on behalf of himself and other stockholders against the city of Rochester impleaded with the Rochester Electric Railway Company and the New York State Railways as lessee and stockholder of the Rochester Electric Railway Company to enjoin the enforcement of chapter 359 of the Laws of 1915 changing the rate of fare on the Rochester Electric Railway.

Chapter 359 of the Laws of 1915 is an act amending the charter of the city of Rochester generally and contains an amendment to section 636 of the charter providing that a corporation operating a street surface railroad shall not charge any passenger more than five cents for one continuous ride from any point on its road to any other point thereon, within the limits of the city of Rochester.

The Rochester Electric Railway prior to the passage of the act was located outside of the city and operated from the boundaries of the city to Lake

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Ontario, charging a five-cent fare each way. By the act the territory through which the railroad passed was annexed to the city. The act in question provides for the reduction of the fare on the railroad by prescribing a five-cent fare for a continuous ride throughout the city.

The act in question is attacked on the ground that it reduces the fare below a point where the railroad can be profitably operated and on the further ground that it violates the provisions of the Constitution relating to private and local bills.

Joseph W. Taylor, for plaintiff, and Willis A. Matson, for New York State Railways, for motion.

B. B. Cunningham, for city of Rochester, opposed.

RODENBECK, J. Chapter 359 of the Laws of 1915 is attacked in the complaint, and the court is asked to set it aside as unconstitutional, on the ground that the act is confiscatory in that it reduces the fare, which the defendant Rochester Electric Railway Company is permitted to charge, below a rate which would provide a reasonable profit and on the further ground that the statute being a local act contains more than one subject not expressed in its title contrary to article III of section 16 of the Constitution. The question as to whether or not the road can be run profitably upon a five-cent fare basis is one that can only be determined after a hearing upon the merits and the motion must fail so far as that proposition is concerned but the latter question is one which appears on the face of the act itself and is open for discussion and determination upon the pleadings.

The question turns upon whether or not the provision in the act relating to a five-cent fare is germane

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to the governmental powers and functions of the city. If it is, then it could constitutionally be included with the other provisions of the act under the general title given to the act. If not, then the act is unconstitutional. The answer to this question depends upon whether or not the regulation of street railroads and particularly the fixing of the fares to be charged comes within the subjects which properly are or may be made a matter of municipal regulation or control. Is the regulation of street railroads so far as a city is concerned "a matter which may be required for the preservation of peace, good order and health within its limits, the promotion of its growth and prosperity and the raising of revenue for its government"? *Louisiana* v. *Pilsbury*, 105 U. S. 278, 289. If their regulation comes within any of these purposes, provisions relating to fares may be included in an act creating a city or one amending its charter generally. It seems to me that upon principle and upon the adjudicated cases the question must be answered in the affirmative. *Public Service Commission* v. *Westchester St. R. R. Co.*, 206 N. Y. 209, 211; *Willcox* v. *Richmond Light & Power Co.*, 142 App. Div. 44; affd., 202 N. Y. 515; *People ex rel. City of Rochester* v. *Briggs*, 50 id. 553; *People ex rel. Lardner* v. *Carson*, 10 Misc. Rep. 237; affid., 155 N. Y. 491; *Scott* v. *Village of Saratoga Springs*, 131 App. Div. 347, 349; *Harris* v. *People*, 59 N. Y. 599, 602 *Economic P. & C. Co.* v. *City of Buffalo*, 195 id. 286, 297; *Tommasi* v. *Archibald*, 114 App. Div. 838, 845; *People ex rel. Village of Brockport* v. *Sutphin*, 166 N. Y. 163, 172. The tendency is to construe this provision of the Constitution liberal v. *People ex rel. Squires* v. *Hand*, 158 App. Div. 510, 514. The construction of a street railroad in a city has been held to be a city purpose (*Sun Printing & Publishing Assn.* v. *Mayor*, 152 N. Y. 257; *Admiral*

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Realty Co. v. *City of New York,* 206 id. 110) and it has been the general practice to include in city charters provisions relating to the regulation of street railroads and for cities to contract with such corporations with reference to fares, transfers and other matters in which the city is directly concerned. The regulation of the conduct of street railroads, with such general limitations as may be imposed, are as much a municipal purpose and the subject of municipal regulation and control as are such matters as the supply of water, the lighting of streets, the disposal of sewage and garbage and the numerous other matters which affect the peace, health, comfort or convenience of the members of the corporation. The regulation of a railroad in a city may affect very seriously not only the convenience of the inhabitants but the growth and development of the city and is therefore a matter of grave municipal concern, particularly since the construction of a railroad in a street or highway acts substantially as a monopoly of the right to use that street or highway for such purposes.

If the subject of the regulation of railroads is a municipal purpose it may be treated under a title amending the charter generally for what may be treated under the charter itself may be treated under such an amendatory act. *Matter of New York & L. I. Bridge Co.* v. *Smith,* 148 N. Y. 540; *People ex rel. City of Rochester* v. *Briggs,* 50 id. 553; *People ex rel. Village of Brockport* v. *Sutphin,* 53 App. Div. 613; affd., 166 N. Y. 163; *Scott* v. *Village of Saratoga Springs,* 131 App. Div. 347; affd., 199 N. Y. 178. By the Railroad Law the legislature has fixed the fares of railroads in cities at not to exceed five cents and by the Public Service Commission Law it has delegated the power to fix fares to that commission but neither the Railroad

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Law nor the Public Service Commission Law nor any other general statute enacted prior to chapter 359 of the Laws of 1915 operated to prevent the legislature from taking up the subject anew or regulating the fare by a local act for a particular city. The Constitution reserves in cities the control of their streets, so far as their use is concerned, by street railroads and provides that the consent of the local authorities to the use of their streets shall be obtained. Art. III, § 18. Thus the legislature itself is restricted in its power over the streets of cities with respect to their use by street railroads but this restriction does not go to the extent of prohibiting the legislature from fixing reasonable rates by direct action. See Railroad Law, § 101; *City of Rochester* v. *Rochester R. Co.*, 182 N. Y. 99, 115; *Buffalo E. S. R. Co.* v. *Buffalo S. R. Co.*, 111 id. 132; *N. Y. C. & H. R. R. R. Co.* v. *Williams*, 199 id. 108, 117; *Richman* v. *Consolidated Gas Co.*, 114 App. Div. 216, 220; *People ex rel. B. idge Operating Co.* v. *P. S. Commission*, 153 id. 129, 135; *People ex rel. Cohoes R. Co.* v. *Public Service Commission*, 143 id. 769. The cases sustaining the right to charge an additional fare growing out of the creation of Greater New York have no application since the legislature in that instance did not attempt specially to prescribe a single fare. See *Hogan* v. *Long Island R. R. Co.*, 206 N. Y. 440. In the face of the general statute prescribing a five-cent fare in cities and the almost universal custom which has grown up under it of charging five cents for a continuous ride on street railroads in cities, it cannot be said without further evidence that the reduction by the legislature of the fare in this instance to five cents is an unreasonable exercise of the power of the legislature. *People ex rel. Cohoes R. Co.* v. *Public Service Commission*, 143 App. Div. 769, 781. The reasonableness of the exercise of the

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legislative power to add new territory to the city and regulate the fare of a railroad operating therein is one of degree and there is nothing on the face of the pleadings to justify a conclusion that such exercise in this case is not a reasonable one. *Braffett* v. *Brooklyn, Q. C. & S. R. R. Co.*, 204 N. Y. 440, 448. The constitutional consent which a city is required to give to the construction or operation of a street railroad (Art. III, § 18) is satisfied in this case by the approval of the act by the local authorities under another provision of the Constitution. Art. XII, § 2. The legislature had the undoubted power to prescribe by a special act a reasonable fare to be charged by this railroad and this power has not been exceeded by the fact that the authority has been exercised in a local act confined to matters relating to the city, the regulation of railroads within a city and the establishment of fares thereon, as the court has found, being a municipal purpose.

The act in question therefore does not violate the provisions of the Constitution relating to the passage of private and local bills and, as the question of the confiscatory character of the act can only be determined after a hearing upon the merits, the motion for judgment on the pleadings is denied.

Motion denied.

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LUDWIG PHILIP HECK, Plaintiff, v. CARL VOELKLE, Defendant.

(Supreme Court, Monroe Trial Term, June, 1916.)

Contracts — written agreements — partnership — actions — evidence.

A written agreement under which plaintiff took charge of the restaurant part of defendant's business in consideration of which he was to receive as compensation a certain percentage of the net earnings of the entire business, the amount to be paid plaintiff for services to be determined upon an accounting each month, does not create a partnership between the parties, plaintiff having no financial responsibility in connection with the business or title to any of the stock or fixtures used therein.

The fact that an action on contract seeks an accounting does not make it an equitable one requiring determination at the Special Term and the case should be sent to the Trial Term.

While the fact that the parties held themselves out as partners erecting an electric sign with their joint names thereon might be evidence to create a liability of both parties to creditors such acts did not change the contractual relation from one of employment to one of partnership.

ACTION on contract.

William J. Baker, for plaintiff.

John A. Bernhard, for defendant.

RODENBECK, J. This action is brought to recover upon a contract made between the parties which plaintiff claims is a partnership agreement and defendant claims is an employment agreement. The contract is in writing and provides among other things that the "party of the first part [defendant] agrees to employ, and does hereby employ the party of the second part

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[plaintiff] to take charge of the restaurant part of said business and to attend to all the details of cooking, preparing and serving meals and lunches in the said business" and "as the agent of the party of the first part to make all necessary purchases for said lunch and meal portion of said business by and under the direction always of the party of the first part, etc.," for which the plaintiff was to receive "one-half (½) the actual net earnings of the entire business including the sale of liquors as well as one-half of the profits derived from the meals and lunches so served; it being expressly understood however that such sharing in the profits shall not make and constitute the party of the second part a co-partner of the party of the first part but that the relation shall be that of employer and employee; the party of the second part being at all times subject to dismissal by the party of the first part" and the plaintiff "shall in no way be liable for any obligations incurred in connection with said business, nor shall he be deemed the owner of any stock or fixtures in connection therewith." The contract further provides for an accounting on the first day of each month at which time there was to be determined "the amount to be paid to the party of the second part for his said services." This contract did not create a partnership between the parties. It expressly provides that the plaintiff is the employee of the defendant; all purchases were to be made by the plaintiff as the agent and under the direction of the defendant; he had no financial responsibility in connection with the business and acquired no title to any of the stock or fixtures used in the business. The terms of the contract make it an employment rather than a partnership contract. The plaintiff was interested in the profits of the business as a means of compensation for services rendered which would not make

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him a partner. *Cassidy* v. *Hall*, 97 N. Y. 159, 168; *Smith* v. *Bodine*, 74 id. 30, 33. To constitute a partnership, parties must have a proprietary interest in the business and in its profits. *Magovern* v. *Robertson*, 116 N. Y. 61, 65. A person making advances and sharing the profits as a means of compensation is not a partner. *Richardson* v. *Hughitt*, 76 N. Y. 55. A stipulation for a salary and a share of the profits as a further compensation does not constitute a partnership. *Lee* v. *Washburn*, 80 App. Div. 410. The action therefore being on an employment contract is not properly on the Special Term calendar and should be sent to the Trial Term for disposition. The fact that the action seeks an accounting does not make it an equitable one requiring determination at Special Term. *Lindner* v. *Starin*, 128 App. Div. 664; *Lee* v. *Washburn*, 80 id. 410; *Smith* v. *Bodine*, 74 N. Y. 30, 32. The parties held themselves out in some respects as partners, erecting an electric sign with their joint names thereon, but these acts in the face of their written contract while it might be evidence to create a liability on the part of both of them to creditors did not change the contractual relation between them from one of employment to one of partnership. *Cassidy* v. *Hall*, 97 N. Y. 159, 169.

Judgment accordingly.

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Matter of the Application of ISABEL W. G. REED for an Order Directing the Issuance of a Writ of Mandamus against the NATIONAL ORDER OF THE DAUGHTERS OF ISABELLA, and others constituting its Officers and National Board of Directors.

(Supreme Court, Oneida Special Term, June, 1916.)

Associations — mandamus — when expulsion from fraternal association illegal — absence of trustee from meeting — power to declare office vacant.

Where on a motion for a peremptory writ of mandamus directing that the "National Order of the Daughters of Isabella," a domestic membership corporation, its officers and directors convene and reinstate petitioner as a member of a subordinate court of the order, no answer in the form of a pleading has been served, whether there is anything more than a question of law involved is to be determined from the moving papers, the uncontradicted allegations of the petition and the statement of facts in an affidavit submitted by the national advocate being taken as true.

While petitioner, who had been for twelve years a member in good standing in a subordinate court of the "National Order of the Daughters of Isabella," was grand regent the supreme regent of the national order preferred two specific charges against her as follows:

1. The act of the subordinate court in removing one K., as trustee, and electing a successor to her and in continuing to recognize and sustain such successor after notice from the national board of directors that an appeal taken by K. had been sustained by that body.

2. The action of said subordinate court in directing its treasurer to refuse to comply with the request of the state regent to send its books, warrants and vouchers to a distant part of the state for examination.

Involved in the charges was the part petitioner as grand regent took to bring about and sustain the doings of her court in that regard and she was charged with wilful insubordination and a contempt of the superior authority of the national board

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of directors in connection therewith. On a trial of the charges before ten members of the national board of directors and officers of the national order, five of said members voted to sustain the charges and expel petitioner from the order, two in the negative and three not voting. On motion for a peremptory writ of mandamus to compel her reinstatement as a member of the subordinate court, held, that as under section 108 of the constitution, laws and rules of the order the five members of the trial body had no power under the facts and law to deprive petitioner of her membership in the order and take from her property rights which she owned therein, there being a mortuary fund connected with the order, her expulsion was illegal.

The fact that K., while a trustee, was absent from six successive regular meetings and that the subordinate court had power to declare her office forfeited, in the absence of an explanation or excuse on her part, and the action of said court in selecting a successor to her to fill the office of trustee deemed vacant did not furnish sufficient grounds for the expulsion of petitioner, especially as she neither acted nor voted on that question except as she presided as grand regent at the meeting at which K.'s successor was elected and subsequently recognized such action as legal.

That the subordinate court when it declared K.'s office forfeited acted within the scope of section 102 of the laws and rules of the national order which provides that "Any officer of a subordinate court absenting herself for three regular meetings in succession, unless excused by a majority vote of her court, shall forfeit her office," and that petitioner could control the vote upon such question, could not be successfully urged.

Granting that upon a claim of the national body that it had always held that the only remedy which a local court had under section 102 of the laws of the order was to certify and declare that any officer named had been absent from three successive meetings and to ask the national order to declare the office vacant and that the appeal of K. was the first on just that point to come before said board of directors and that it had never accepted or sustained or maintained the right or authority in any local court to remove any member from office or expel any member for any cause whatever except for nonpayment of dues, the matter was within the jurisdiction of the national body, yet without a positive rule of action to guide the subordinate court

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its members might well understand conscientiously that the power was vested in them to declare an office vacant, especially in the circumstances of the instant case.

That there being no authority in the constitution, laws or rules of the national body or subordinate court to remove the books and records of the local court to a distant part of the state, nothing more than a full right of examination being given to the superior body, the petitioner as grand regent could not be said to have the power to control the action of the local court having a membership of nearly 400, she not being responsible so far as the records disclose for the action of the court; if there had been a violation of the constitution, laws and rules of the national order it was not the action of the petitioner but that of the local court.

MOTION for a peremptory writ of mandamus.

Warnick J. Kernan and Daniel E. Meegan, for petitioner.

Russell H. Brennan, for defendants O'Donnell, Henry and Wankel.

P. H. Fitzgerald, for National Order of the Daughters of Isabella, and others.

DEVENDORF, J. Motion by Isabel W. G. Reed for an order directing that a peremptory writ of mandamus issue against the National Order of the Daughters of Isabella and its national officers and board of directors, commanding them to convene and reinstate her as a member of Court Utica No. 1 of the Daughters of Isabella, or, if the applicant's right to mandamus does not depend upon questions of law only, then that an alternative writ issue. No answer in the form of a pleading has been served and whether there is anything more than a question of law involved is to be determined from the petitioner's moving papers and the affidavit submitted by the national advocate, Mr.

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Fitzgerald. The uncontroverted allegations of the petition and the statement of facts in such affidavit are to be deemed true. *People ex rel. Croft* v. *Keating*, 49 App. Div. 123; *People ex rel. Corrigan* v. *Mayor*, 149 N. Y. 215.

Considering the facts as disclosed by the papers and records, according to the rule above announced, I am of the opinion that this is not a case for an alternative writ of mandamus. If this is correct then questions of law only arising upon the undisputed facts are involved in this controversy, viz: whether petitioner is entitled to a peremptory writ or not. There is a question whether the affidavit of the supreme regent (Mrs. Walsh) and the national secretary (Mr. Kelly) may be regarded as the allegations of the defendant, the National Order of the Daughters of Isabella, but as it is presented by the national advocate of said order I give it the benefit of the doubt and shall deem it a truthful statement of the facts, not, however, considering the conclusions and opinions contained therein as allegations of fact. They must be disregarded. *Matter of Pierce, Butler & Pierce Mfg. Co.*, 62 Hun, 265; *People ex rel. Rau* v. *York*, 31 App. Div. 527.

March 29, 1916, Miss Reed, the petitioner, was the grand regent of said Court Utica No. 1 of the Daughters of Isabella and had been a member in good standing therein for more than twelve years, it being a subordinate court of the national order of the Daughters of Isabella, which is a membership corporation organized and incorporated under the laws of the state of New York, having its principal office at Utica, N. Y., and its principles are to promote the social and intellectual standing of its members, literary purposes and the rendering of such aid and assistance among its members as shall be desirable and proper, and by such lawful means as shall seem best.

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On the 20th day of March, 1916, the supreme regent of the national order preferred charges against Miss Reed and subsequently a trial thereof was had before ten members of the national board of directors and officers of said national order, which resulted in five members of such trial body voting to sustain the charges and expel her from the order, two in the negative and three not voting. The charges preferred were somewhat general in form but finally resulted in two definite accusations, viz: (1) the action of Court Utica No. 1 in removing Catherine N. Kelly as trustee and electing a successor to her, and in continuing to recognize and sustain such successor after notice from the national board of directors that the appeal of said Catherine N. Kelly had been sustained by that body, (2) the proceeding of said court in directing its treasurer to refuse to comply with the request of Katherine M. Rosney, state regent, to send its books, warrants and vouchers to Poughkeepsie, N. Y., for examination.

Involved in these two specific charges is the part Miss Reed, as grand regent, took to bring about and sustain the doings of her court in that regard, and she is charged with wilful insubordination and a contempt of the superior authority of the national board of directors in connection therewith. She claims such expulsion was illegal. That five members of such tribunal had no power under the facts and law to deprive her of a membership in this organization and take from her the property rights which she owned therein, a mortuary fund being connected with the order. See Constitution, Laws and Rules, § 108.

The material facts are not in dispute, as stated, and there should be either a peremptory writ of madamus or a dismissal of the petition. There are several reasons why I think the petition should be sustained and a peremptory writ granted. In the first place it

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appears without dispute that Mrs. Kelly, holding a position as trustee, was absent from six successive regular meetings and that the court had power to declare her office forfeited in the absence of an explanation or excuse on her part. At least, it is sufficiently debatable that bad faith could not be imputed to a member or officer taking part in declaring such forfeiture. Her office being deemed vacant, the act of selecting Miss Brazill to fill the vacancy does not furnish sufficient grounds for the harsh remedy of expulsion, especially so when we consider that the petitioner neither acted nor voted upon that question, excepting as she presided as grand regent at the meeting and subsequently recognized the action as valid.

That she could control the vote of the court upon such a question cannot be successfully urged. That Court Utica No. 1 acted within the scope of the laws and rules of the national order (§ 102), which provides that " any officer of a subordinate court absenting herself for three regular meetings in succession, unless excused by a majority vote of her court, shall forfeit her office," when it declared Mrs. Kelly's office forfeited appears reasonable, particularly so when she had been absent for six regular business meetings in succession and refused to present an excuse when given an opportunity. The majority vote of her court had the power to excuse the forfeiture; hence power may be inferred to declare it.

The national board by the affidavit filed herein takes the position that " the national body has always held that the only remedy which a local court had under section 102 of the laws of the order was to certify and declare the fact that any officer named had been absent from three successive meetings and to ask the national body to declare the office vacant, and the appeal of said Catherine H. Kelly was the first appeal on just

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that point to come before said board of directors, and said board of directors have never accepted or sustained or maintained the right or authority in any local court to remove any member from office or expel any member for any cause whatever, except for non-payment of dues." Granting that position to be correct, that it was a matter within the jurisdiction of the national body, yet, without a positive rule of action to guide the subordinate body, its members might well understand conscientiously that the power was vested in them to declare an office vacant, especially where there had been six successive unexcused absences and a subsequent refusal to explain them.

In *Brendon* v. *Worley*, 8 Misc. Rep. 253, it was held: "Where there is no ambiguity in the by-laws of an association, but their meaning is clear and precise, opinions of superior officers of the order with which it is connected as to their meaning are inadmissible." The opinion of the superior officers in the case at bar cannot control in the matters under consideration. Assuming that they are right in their conclusion that it was a matter for the national body to determine, that certainly does not give the power to expel a member in good standing for taking part in or sustaining the vote of the subordinate order, especially when there are not only personal but property rights and pecuniary interests concerned. *Rudolph* v. *Southern Beneficial League*, 23 Abb. N. C. 199.

Assuming all the facts claimed on the part of the national advocate to be established, and inferences to be drawn therefrom, together with the uncontroverted allegations of the petition, affidavits and records submitted in reference to the charge as to the forfeiture of Mrs. Kelly's office, and the subsequent proceedings in regard thereto, no sufficient or legal reason is established thereby to justify Miss Reed's expulsion.

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Upon the other question as to the action of said court, and Miss Reed's participation therein, in directing its treasurer to refuse to comply with the request of state regent Rosney to send the books, warrants and vouchers to Poughkeepsie, there is but little to be said because clearly the records of the court (subject to proper examination by the national body) are under the jurisdiction of the members of such court. I find no authority in the constitution, laws or rules of the national or subordinate courts, and none has been pointed out to me, to remove the books and records of the court to a distant part of the state — full right of examination on the part of the superior body is given, nothing more.

This court has a membership of nearly 400 and Miss Reed as grand regent thereof cannot be said to have the power to arbitrarily control the action of that number of individuals; she was not responsible, so far as the records disclose, for the act of the court. Whether its determination was right or wrong it is not necessary to discuss here; upon Mrs. Manion's resolution the vote to withhold the books from transportation to Poughkeepsie was 190 to 9.

It may be said, however, that the language of subdivision 2 of section 51 of the laws and rules of the national order defines the power of the district or territorial deputies, and which under subdivision 3 of section 50 is likewise made the power of a state regent. It is simply enacted that they shall "inspect the books, vouchers and accounts of courts within the district and may at any time demand them for examination." It does not provide, as does subdivision 2 of section 38 which defines the duty of the committee on finances and audit, that they "shall be entitled to the possession thereof and all officers shall deliver the same to them."

It will be observed by the above that the state regent

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is empowered to inspect the books and may demand them for examination. It does not provide that the grand regent of the subordinate court shall assume the hazard, risk or duty, if you choose, to forward such books or records to another part of the state. It is very probable that this could have been done and without serious chance but a failure or refusal to do so by the subordinate court does not in my opinion penalize the grand regent to the extent of expelling her from her court and depriving her of rights of membership and property therein. A contrary construction of the laws and rules of the order would be a harsh, unreasonable and unwarranted one.

Therefore, assuming to the petitioner the fullest power within the possible latitude of the language of of the laws and rules of the organization, I unhesitatingly reached the conclusion that there has been no act, affirmatively or of omission, on her part which authorized the supreme body to deprive her of her rights of membership. If there has been a violation of the constitution, laws and rules of the national order, it is not the action of the petitioner but the action of Court Utica, made up of the large membership above mentioned.

The petitioner was entitled to a fair trial before an impartial tribunal and if the method was not regulated by the laws of the association it should be analogous to ordinary judicial proceedings, so far, at least, as to permit substantial justice. *Wachtel* v. *Noah W. & O. Ben. Soc.*, 84 N. Y. 28.

Where such serious results as expulsion from membership follow, those who allege irregularity, in the procedure to expel, must be held to strict proof, for no presumption will be indulged to support a forfeiture, which the law abhors. *People* v. *Medical Society*, 32 N. Y. 193.

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It has been held that refusal of a treasurer in Journeyman Stone Cutters Association to surrender his books and papers to a special committee appointed to investigate a certain bill or account, when by the by-laws he was only required to surrender his books and papers to the trustees to be audited, or to be delivered to his successor, was not sufficient ground for suspension of membership. *Connell* v. *Stalker,* 21 Misc. Rep. 609. The presumption is against the power to expel because it is in the nature of a forfeiture, which, as stated above, the law does not favor. *White* v. *Brownell,* 4 Abb. Pr. (N. S.) 162.

I am aware of the fact that it is not proper for the court here to consider the weight of the evidence and to substitute its judgment thereon for the judgment of the national body, but if their determination of the petitioner's guilt of the charges is unsustained by any substantial evidence such determination should here be considered as contrary to law and natural justice and so subject to review and correction. *Fritz* v. *Knaub,* 57 Misc. Rep. 411, and cases cited.

There is a further question upon which I think something may properly be said, and that is, that the vote of expulsion was not by a majority of the national directors and officers present at the trial. The trial board consisted of ten members (as stated heretofore), three of whom did not vote; five voted for expulsion and two were opposed. To permit petitioner to be deprived of membership and property rights by the vote not of a majority of those hearing the charges, but by a majority of those voting on the charges is to sanction and judicially approve a method of trial in the membership corporation which is contrary to law.

There is nothing (as I understand it) in the laws and rules of the national order designating the number of the national board of directors to carry a vote of

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expulsion — therefore, the majority rule should prevail — there should be at least a quorum and the affirmative vote should be by a majority of those present and participating in the trial. Section 34 of the General Corporation Law (Laws of 1909, chap. 28) provides that the affairs of every corporation shall be managed by its board of directors — unless otherwise provided, a majority thereof at a meeting duly assembled shall be necessary to constitute a quorum for the transaction of business and the act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors. In the absence of a definite rule in the laws of the national organization for such a trial, and as to the necessary number of the national board to announce a valid result, the statutory provisions above stated should control. A quorum should be a majority of all the directors and the act of a majority of those present shall be the act of the board, not a majority of the members voting.

Where a corporation is authorized to take any action by the agreement or action of its directors, managers or trustees, it may be taken by such directors regularly convened as a board and acting by a majority of a quorum, except when otherwise expressly required by law or by the laws of the corporation. Gen. Corp. Law, § 43.

The argument of the national advocate as to the Membership Corporations Law, and its force and effect on the questions at bar, has not been overlooked but I think there is nothing in that law which is controlling herein as against the provisions referred to of the General Corporation Law, but, on the contrary, there is language therein which sustains the contention that the act of expulsion should be by a majority vote of the members of the trial body.

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At the close of the trial Mrs. O'Donnell, one of the national directors, made the pertinent suggestion whether it had been clearly brought out that it was not Miss Reed who elected the new trustee in place of Mrs. Kelly — that it was not Miss Reed who refused to send the books to the state regent, but it was Court Utica No. 1. I agree with the evident force of those suggestions. The minutes of the court show its affirmative action in each of the two material matters charged against Miss Reed. The proof does not establish the allegations against her and the record is without facts to sustain the expulsion; she had social membership and property rights which could not be taken from her by the national body. The conceded facts and undisputed records do not confer the necessary legal power upon it to do that. There was also a failure of a majority vote of the directors and officers at the trial. Peremptory writ of mandamus granted, with costs.

Motion granted, with costs.

EDWARD C. PURDY, Plaintiff, *v.* MAYME D. WILKINS, Sometimes Known as MAYME DE WARE, et al., Defendants.

(Supreme Court, Albany Special Term, June, 1916.)

Foreclosure — of mortgages — sale in — what constitutes primary fund for payment of mortgage debt — when sale set aside — liens.

Mortgaged premises constitute the primary fund for the payment of the mortgage debt and only where the mortgagee has endeavored to collect the same out of the land can a just judgment for deficiency be entered.

Upon a sale on the foreclosure of a mortgage for $950 upon several pieces of property in which the equity was sworn to be from $5,000 to $12,000, plaintiff bid in the property for $1,300

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and entered a deficiency judgment for $1,085.93 because under his bid there was not enough money to discharge back taxes and water rents amounting to $1,191.69, expenses of sale $87.50, and unpaid costs $20.81. The prior liens against said premises exclusive of unpaid interest amount to $12,800. On motion to set aside the sale, held, that plaintiff having neglected to foreclose against one of the properties was in no position to enter a judgment for deficiency, and that the sale should be set aside and a resale ordered on the ground that the price at which plaintiff bid in the property was grossly inadequate.

MOTION to set aside a judgment of foreclosure and sale.

Charles B. Templeton, for defendant Wilkins, for motion.

Crawford & Cogan (Henry J. Crawford, of counsel), for plaintiff, opposed.

HASBROUCK, J. The defendant, Mayme D. Wilkins, a colored woman, kept a disorderly house, and owned subject to incumbrances several lots, three on Dallius street and three on Madison avenue, viz., 49, 51 and 53 in the city of Albany. In making some improvements she became in debt to the plaintiff, and thereafter she executed a mortgage covering all of the above premises, in the sum of $950 to secure the debt. The mortgage has been foreclosed. In the proceeding the referee to compute the amount due reported $970.36. A sale was had, and the plaintiff bid the properties foreclosed in for $1,300, took title and thereafter entered a judgment of deficiency for $1,085.93. The deficiency arose because under the bid there was not enough money to discharge back taxes and water rents, amounting to $1,191.69, expenses of sale $87.50, and unpaid plaintiff's costs $20.81. The prior liens against

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these premises exclusive of some unpaid interest amount to $12,800.

Thomas J. Graveline, who has qualified as a public expert on values, and whose interest in the affairs of an easy victim of business capacity is not apparent, swears the fair value of all these properties is $24,500 — nearly twice as much as there is against them. There is too — not to be overlooked — the judgment of deficiency resulting from the amount of the $1,300 bid. There can only be a just judgment of deficiency where the mortgagee has endeavored to collect the debt out of the land pledged. It constitutes the primary fund for the payment of the debt. Here it seems undisputed that the plaintiff neglected to foreclose against No. 51 Madison avenue, and therefore is in no position to enter a judgment for deficiency. *Spring* v. *Haynes*, 21 Maine, 126.

The injustice of the plaintiff's conduct becomes apparent when an execution issued upon such judgment is used to take the defendant's household furniture, and that at a time when because of the unlawful trade she pursued she was sentenced to jail and banished the city. The plaintiff should have his money, but he ought not to take more of the defendant's property than is necessary in satisfaction. I think the proceeding for a deficiency is unjustifiable; that the sale of a property for $1,300, whose equity is sworn to be worth from $5,000 to $12,000, is grossly inadequate. Under all the circumstances I cannot free myself of the conviction that the erring woman, because of her infirmities of character, caught in legal toils, is being shorn. The power of the court in the premises, by a very learned and sound judge, is described as follows: "Courts of equity exercise a supervision of sales made under their decrees, which is not in all cases controlled by legal rules, but may be guided by con-

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siderations resting in discretion. They may set aside their own judicial sales, upon grounds insufficient to confer upon the objecting party an absolute right to a resale. They may relieve against mere mistakes, accidents or hardships, or oppressive or unfair conduct of others, though such conduct may not amount to a violation of law." *Fisher* v. *Hersey*, 78 N. Y. 389.

Provoked to the exercise of discretion, the court sets aside the sale in foreclosure herein and orders a resale.

Ordered accordingly.

Matter of the Petition of JAMES P. PHILIP for an Extension of Time to Complete the Purchase of the Premises, etc., Sold at Public Sale by ORLIFF T. HEATH, Referee, under a Judgment of Foreclosure in an Action in this Court Entitled:

WILLIAM PALMATIER as Substituted Trustee for the Benefit of the First Income Bonds Secured by a Certain Mortgage Executed by THE CATSKILL MOUNTAIN RAILWAY COMPANY, Plaintiff, *v.* THE CATSKILL MOUNTAIN RAILWAY COMPANY et al., Defendants.

(Supreme Court, Greene Special Term, June, 1916.)

Railroads — foreclosure of mortgage against — right of purchaser — waiver of purchaser — deficiency — Code Civ. Pro. § 1678.

As section 151 of the Railroad Law provides that an individual purchaser at the sale of a railroad may operate it for six months until a corporation has been formed for such purpose, the request of a purchaser of a railroad at a foreclosure sale for additional time to search the title and ascertain means to catalogue the property and for opportunity to form a new corporation to take over the operation of the road and its fran-

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chises furnishes no ground for granting an extension of time to complete the purchase.

A railroad was sold in foreclosure under an order which provided that if any purchaser should fail to comply with the terms of sale the property should again be put up for sale upon the same terms, without application to the court, and that the purchaser would be held liable for any deficiency on a resale. Held, that under section 1678 of the Code of Civil Procedure where a bidder at the sale failed to complete his purchase in accordance with the usual terms of sale the referee to sell has no right to put the property up for sale at his office without publication.

A purchaser of a railroad at a sale in foreclosure does not by refusing to complete his purchase waive his right to complain of a private sale of the property by the referee without publication of a notice of sale, though by an order of the court he was excused from payment of a deficiency.

MOTION for an extension of time to complete the purchase of premises sold under a judgment of foreclosure.

Marcus T. Hun, for motion.

Osborn, Bloodgood & Wilbur (Frank H. Osborn, of counsel), opposed.

HASBROUCK, J. On the property of the Catskill Mountain Railway Company there were mortgages securing an issue of first mortgage bonds amounting to $39,000; an issue of second mortgage, first income bonds amounting to $238,000; an issue of second income bonds amounting to $15,000. The above entitled action was instituted to foreclose the mortgage securing the second mortgage income bonds, and besides to apply the proceeds of the sale to the payment of outstanding receivers' certificates and the first mortgage bonds. The property covered by the mortgages consists of a railroad and its appurtenances operated in

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Greene county between the villages of Catskill and Palenville, approximately from May first until November each year, to accommodate the traffic between the mountain and country resorts and the village of Catskill. Preparation for the entertainment of summer guests and their arrival commences about the first of May. The suit had proceeded to a judgment of foreclosure and sale. The sale was advertised for April 17, 1916, at the Court House, Catskill. On that day several persons interested in the bonds appeared as bidders. The terms of sale were in the usual form, ten per cent down and required the payment of the balance at the office of the referee, Catskill, April twenty-fifth. There was bid by the interests in control of the road $27,100, and by James P. Philip $28,000 and the property was struck down to him. He paid the ten per cent and signed the terms of sale, which provides further, among other things:

(7) "The bidding will be kept open after the premises and property have been struck off to a bidder, and in case any purchaser shall fail to comply with these terms of sale, or any part thereof, the premises and property so struck off to him will be again put up for sale, under the direction of said referee, under the same terms of sale, without application to the court, unless the plaintiff's attorneys shall elect to make such application, and such purchaser will be held liable for any deficiency there may be between the sum for which said premises and property shall be struck off upon the present sale and that for which they may be purchased on a resale, and also any costs or expenses occurring on such resale."

Philip applied to the referee for an extension of time to complete the purchase, stating that there was not sufficient time for him to ascertain the validity of the title and freedom from liens of the defendant company,

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nor time to organize a new corporation to take over the operation of the franchise and property. The referee, after communicating with the plaintiff's attorney, refused to grant the request. On April twenty-fourth, Philip procured an order to show cause with a stay of the sale, returnable May sixth, at Kingston, why he should not be granted additional time. About midday, April twenty-fifth, the stay was vacated. Philip failed to pay the balance of the purchase price in accordance with the terms of sale on the twenty-fifth and the referee, after ascertaining that Philip did not intend to complete his purchase, put the property up for sale at the office of the referee, and resold it for $28,000 to E. E. Olcott and others, being the same persons who had bid $27,100 at the sale on the seventeenth. On May third Philip made a second motion, returnable May sixth, at Kingston, for an extension of time; the cancellation of the deed to Olcott; the reinstatement of the sale to Philip, or for a properly advertised new sale.

The action should have been timed to have secured a sale at an earlier date in the year, having reference to the season of beginning the operation of the railroad. But it was not, and the court was compelled to deal with the situation as it existed, and therefore did not undertake to postpone the day of compliance with the terms of sale. Under the facts three questions are presented for determination.

1. Should Philip's time to complete his purchase be extended? He requested additional time for the reasons that he did not know about the title to nor liens against the property, and desired to search the title and ascertain the liens. The property had been incumbered by the mortgages since 1885, and in the same ownership for thirty years; the record of liens and incumbrances was in the court house near to Philip's office, and a

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search could have been made for them in half a day. It is not at all apparent to the court that additional time was needed for any such purpose. Nor was additional time needed to catalogue the property. That should have been attended to before the bidding. It would hardly be claimed to be reasonable conduct to bid upon the property, the extent or character of which was unknown to the bidder. Philip further claimed the completion of the sale should be postponed until be had an opportunity to form a new corporation to take over the operation of the road and franchise. This was entirely unnecessary, for the statute provides that an individual purchaser at the sale of a railroad may operate for six months until a corporation has been formed for such purpose. Railroad Law, § 151; *Village of Phœnix* v. *Gannon*, 195 N. Y. 474.

Though the court was not impressed with these reasons for the extension of time, yet it would have granted it if it were not that other than private interests were involved; consideration of the traveling public, their means of ingress and egress to and from the villages and places where summer entertainment is furnished and the shipping and supplies thereto, led the court to the conclusion that the operation of the railroad should be commenced as soon as possible after the date of the sale.

The second question is, had the referee any right to put the property up for sale at his office on the failure of Philip to complete his purchase on the twenty-fifth of April?

The sale being authorized by the judgment of foreclosure is regulated by the Code (§ 1678). "A sale made in pursuance of any provision of this title, must be at public auction to the highest bidder. Notice of such sale must be given by the officer making it, as prescribed in section 1434 of this act."

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The terms of the statute were complied with by the referee by advertising a public auction, and offering and selling the property at the same. The applicant, Philip, by bidding and having his bid accepted, and submitting to the terms of sale and paying the ten per cent became the purchaser. He says that when he failed to comply with its terms the referee had the power to put up the premises and property for sale, or, if the plaintiff's attorney was desirous of holding him for a deficiency, he might apply to the court upon notice to him for an order decreeing a resale. *Anthon* v. *Bachelor,* 5 N. Y. Supp. 798; *Chase* v. *Chase,* 15 Abb. N. C. 95.

What he did and what the respondents claim he had the right to do was, when the purchaser failed to pay the balance of the purchase price at the office, to put the property and premises up for sale at his office and resell it immediately. They claim the conduct of the referee to be justified by what the Appellate Division, first department, said in *Egan* v. *Buellesbach,* 116 App. Div. 309, speaking of terms of sale identical with those above quoted: "These terms of sale have been in use for many years, and are perfectly familiar to all purchasers at judicial sales. There could be no question but that if the referee had immediately upon the purchaser's stopping payment of the check and refusing to comply with the terms of sale put the property up for resale, without application to the court, the purchaser would have been liable for any deficiency."

I do not understand the language to mean that the property could be immediately offered for sale without advertising in the newspaper and posting the notice. What it does mean is that the property and franchises could be immediately readvertised and noticed and thus put up for resale. This word "immediately" as used by the court in the language heretofore quoted

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from the *Egan* case has reference to putting up for sale without mediation of a court order. Thus interpreted it is in harmony with reason and with the cases. When the property is struck off and the terms of sale signed and complied with, as far as required on the sales day, and the bidders have departed, and the day faded into the past, the referee cannot sell again without compliance with the statute. In *Jones* v. *Null,* 9 Neb. 256, the sheriff had sold some real estate to one Colby for $1,925. He failed to complete his purchase, and the sheriff an hour after the sale, going back to the place thereof, resold. The court held, " He cannot wait until the sale is closed and the bidders have departed before again offering the property for sale."

In the case of *Barnard* v. *Duncan,* 90 Am. Dec. 416, 38 Mo. 170, the court discussing a similar situation where bidders had departed says, " Upon the refusal to accept it (the deed) the trustee proceeded at once to put up the property for sale again at the same place, on the same day, without readvertising or any new notice, and few persons being present, the property was resold for twenty-five dollars. This proceeding can neither be justified nor sustained. It was, in practical effect, a sale without notice. The sale, as advertised, had taken place several hours before, and all the bidders had departed. Though yet within the hours mentioned in the advertisement, it cannot be considered a fair and valid sale pursuant to notice."

It is not pretended that the sales in the two above described cases were under terms of sale like those in the case at bar. The point is that for a sale held at the office of the referee eight days after the first sale there was no notice, no publication. That there were at the referee's office bidders was an accident. In a sale so had the very purposes of the statute were ignored. The referee is authorized to sell by the decree

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as directed by the statute. If the sale for any reason fails he has the power to carry out the terms of the judgment and resell, but it must be a public sale upon notice. *Bricknell* v. *Byrnes*, 23 How. Pr. 486; *Gross* v. *Jancsok*, 16 Daly, 346; *Hewlett* v. *Davis*, 3 Edw. Ch. 357; *Home Ins. Co.* v. *Jones*, 45 How. Pr. 498; 27 Alb. L. J. 508; *Lents* v. *Craig*, 13 How. Pr. 72; 2 Abb. Pr. 294; Thomas Mortg. (3d ed.), § 988. The judgment of foreclosure cannot be executed by a private sale. *Ely* v. *Matthews*, 128 App. Div. 515; *Vannerson* v. *Cord*, Smedes & M. Ch. 345. The only manner in which a deficiency judgment on the bond or against a purchaser for refusing to comply with the terms of sale can be determined is by a public sale. *Nesbit* v. *Knowlton Hall Co.*, 45 Misc. Rep. 513.

These reasons and cases leave little doubt but that the referee was without power to resell without readvertising and reposting. The distinctive features of a public sale are, advertisement published in a newspaper, notices posted in public places, exposure for sale of the thing to be sold in a public place. A sale not having such features could not be a public sale. The vice in the sale at the referee's office is that it was a private sale.

The third question is, had Philip the right to complain of the sale? It may be claimed that having refused to complete his purchase, and being excused from payment of a deficiency by the order vacating the stay, he is in no position to challenge the validity of the resale. I think the matter jurisdictional. There was no authority for the sale had, nor for the acceptance of any other bid after the day of the first sale. *May* v. *May*, 11 Paige, 202. Philip did nothing after the sale of the twenty-fifth of April to waive his right to bid.

The order vacating the stay as far as it excused

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Philip from the payment of a deficiency is vacated. The sale is set aside, the deed cancelled and a resale ordered. If less shall be realized than $28,000 at the resale, application may be made to the court to fix the liability and amount of deficiency which Philip should be required to pay because of failure to complete his purchase on the original sale. The purchaser at the office sale should be repaid out of the proceeds of the resale moneys necessarily spent in opening and placing in readiness the railroad for operation. The same referee is appointed.

Ordered accordingly.

ISIDOR BUXBAUM, as Administrator of the Goods, Chattels and Credits which were of ANNA LOUISE KROLL, Deceased, Plaintiff, *v.* HENRY PAULSEN, Defendant.

(Supreme Court, Greene Special Term, June, 1916.)

Venue — motion to change place of trial denied — damages — Code Civ. Pro. § 768.

While an action to recover damages because of the alleged negligence of defendant which resulted in the death of plaintiff's intestate should be brought in the county where both parties to the action reside the plaintiff may lay the venue in the county where the cause of action arose.

Where on a motion to change the place of trial to the county where both parties reside, as the proper county, plaintiff under section 768 of the Code of Civil Procedure, as amended, which provides for the service of answering affidavits before the hearing of the motion and for the granting of affirmative relief to the adverse party, serves answering affidavits asking for the trial of the issue in the county where the venue is laid on the ground of the convenience of witnesses and because justice will be thereby promoted, and the court so concludes, the motion of defendant will be denied and plaintiff's motion granted.

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MOTION by defendant to change the place of trial from Greene to Kings county as the proper place for trial.

Osborn, Bloodgood & Wilbur (F. H. Osborn, of counsel), for plaintiff.

Leonidas Dennis (Almond D. Fisk, of counsel), for defendant.

RUDD, J. Both parties are residents of Kings county. The accident resulting in the death of plaintiff's intestate, which gives rise to this action, occurred in the county of Greene.

The action is brought to recover damages because of the alleged negligence of the defendant which resulted in the injury causing the death of plaintiff's intestate.

The defendant moves to change the place of trial, as above stated, on the ground that both parties resided in Kings county at the time of the commencement of the action.

From the papers submitted upon this motion the court must determine whether the convenience of witnesses would be best served by having trial in the county of Greene.

Starting with that determination the question is whether under the provisions of the Code the motion of the defendant should here be granted because the parties are residents of Kings county, irrespective of the conclusion with reference to where the action should be tried having in mind the convenience of witnesses.

Formerly a party could not prevent the change of the place of trial to the proper county for the reason that the ends of justice would be promoted by having the trial elsewhere. There has however been a recent

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amendment to section 768 of the Code of Civil Procedure to which the court's attention is called and the contention is here made by the plaintiff that that amendment enables the court upon this motion to decide practically all of the questions involved in the motion, for the change of place of trial, and determine in which county the trial should be had, irrespective of the fact that Kings is the proper county when only the question of the residences of the parties at the time of the commencement of the action is taken into consideration.

The defendant contends that the plaintiff had no right to bring the action in Greene county, that the question involved is jurisdictional and that the defendant has a right to have the cause of action tried in the proper county, that, therefore, the court upon this motion must change the place of trial from Greene to Kings county, after which, within the judicial district within which Kings is located, a motion can be made by plaintiff for the removal of the cause from Kings county to that county where the convenience of witnesses would be served and the ends of justice promoted.

The court does not believe that the question is jurisdictional. Kings county is the proper county in which the action should have been brought, but it can hardly be said that the plaintiff had no right to bring it elsewhere; the plaintiff could invoke the processes of the court in a county other than Kings, and then provision is made for the removal of the cause if the court so determine.

The defendant contends that no Special Term within the third judicial district can be permitted to make an order which will permit the place of trial to remain in Greene county because that order can only be made by a court sitting in the judicial district which includes Kings county.

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Section 987 of the Code provides for changing the place of trial. Such place of trial can be changed from the proper county to another county for one of two reasons:

2. "Where there is reason to believe, that an impartial trial cannot be had in the proper county."

That is, in the county where the parties have a right to bring their action.

3. "Where the convenience of witnesses, and the ends of justice, will be promoted by the change."

That provision of the Code modifies and renders elastic those sections of the Code requiring that certain actions "must be tried" in a specified county.

The courts have for years followed the determination laid down in *Veeder* v. *Baker*, 83 N. Y. 156, where it was determined that the right of a party to have the trial had in the proper county could not be defeated upon a motion by showing that the convenience of witnesses and the ends of justice would be promoted by changing the place of trial.

If that doctrine is still in force it controls this motion.

There is a constantly growing and developing theory in the law, and in the rules controlling the procedure, and in the provisions of the Code, with a view of simplification. The effort is constantly being made to prevent multiplicity of actions and also multiplicity of motions. Many motions made in the courts are entirely and absolutely unnecessary to be made. The motives back of many motions which are made are questionable. The effort is to prevent the delay resulting from unnecessary motions, which always results, however the motion may be determined, in a certain amount of unnecessary delay.

Efforts are being made to have all the facts presented at the earliest possible moment and with the

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least number of motions addressed to the court. The tendency is also towards frankness in statements of facts, in order that the court and the parties each and all may be advised of what there is which properly should be given weight and possibly should be governing and controlling.

This, as the court understands, was one object of the enactment of the amendment to section 768 of the Code of Civil Procedure. This section of the Code provides for the service of answering affidavits before the hearing of the motion, and it provides for the granting of affirmative relief to the adverse party.

It provides that the adverse party "must, where at least eight days' notice of the motion shall be given, at least one day prior to the time at which the motion is noticed to be heard, serve upon the attorney for the moving party copies of the affidavits and papers which he expects to read in opposition to the motion; he may, at least three days prior to the time at which the motion is noticed to be heard, serve upon the attorney for the moving party a notice, with or without affidavits or other papers in support thereof, specifying *any kind or kinds of relief* in the alternative or otherwise to which he claims to be entitled in the action whether the relief so asked for be responsive or not to the relief asked for by the moving party."

Rule 37 since the amendment also provides for the service of answering affidavits on a motion.

The court, referring to amended section 768, has said in *Chapman* v. *Read*, 149 App. Div. 52: "This legislative enactment should receive a liberal construction to accomplish the purpose intended. It is quite clear that the purpose of the Legislature was to enable not only a moving party, but a party against whom a motion is made, to demand such relief, as, on the facts presented, he deems himself to be entitled to at the

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time, and thus minimize practice motions and both save time to the courts and expense to litigants."

This was a unanimous determination of the Appellate Division in the first department affirming a similar determination of the Appellate Term.

The question comes up squarely on this motion, the plaintiff has served his answering affidavits, he asks for the trial of the issue in Greene county on the ground of the convenience of witnesses and because justice would thereby be promoted.

This court is of the opinion that Greene county where the action arose is the county in which, having in mind the convenience of witnesses and the promotion of justice, the trial should be had, and the question might as well be determined now as at some later time. It may be that this court is not as well able to reach a proper conclusion as to where justice requires this trial to be as would be the Special Term in Kings county, but believing that the amendment to section 768 of the Code means something, and being of the firm conviction that justice demands the earliest possible determination of such questions with the least friction and with the greatest amount of simplicity in the methods of practice, this court reaches the conclusion that the motion of the defendant to change the place of trial from the county of Greene to the county of Kings should be denied.

An order may be made denying defendant's motion and granting the motion of the plaintiff that the place of trial of this issue remain where the venue is now laid in the county of Greene, on the ground that Greene county would best serve the convenience of witnesses who are necessary and material in the trial of the issue, and that justice would thereby be promoted.

Ordered accordingly.

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CORA F. GREEN, Plaintiff, *v.* GEORGE A. LAMPMAN and Others, Defendants.

(Supreme Court, Greene Trial Term, June, 1916.)

Partition — complaint in — interest of widow of intestate — dower — Code Civ. Pro. § 1533.

Where the only interest of the widow of an intestate, in premises of which he died seized, arises from her right of dower which has neither been admeasured nor assigned, and it appears that, without great prejudice to the owner, there can be no partition of the property, which since the death of the intestate has been occupied by his widow, she is entitled under section 1533 of the Code of Civil Procedure to have the complaint in an action brought for partition by a tenant in common of a vested remainder in the property dismissed, but without costs.

ACTION for partition.

J. L. Patrie, for plaintiff.

D. H. Daley, for defendant, Ida M. Crusan.

CHESTER, J. The action is brought for the partition of certain lands of which George B. Lampman died seized and possessed. He died intestate in March, 1905, leaving the plaintiff and a brother and sister of hers as the only heirs at law of such deceased and also leaving Ida M. Crusan, his widow, who since his death has remarried the defendant John H. Crusan. The widow moves for a dismissal of the complaint, with costs, under section 1533 of the Code of Civil Procedure, she having refused to give her consent to a sale of the premises. The premises consist of a single family dwelling house, about twelve and a half acres of land, a small barn and a wagon shed and a small

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carpenter shop, now used for a chicken house. Since the death of her husband Mr. Lampman, she has been occupying the entire premises. Her only interest in the premises arises from her right of dower, and that so far as appears has not been admeasured or assigned. The testimony shows that there can be no partition of the property without great prejudice to the owners. The case seems to be therefore within the language of the section of the Code of Civil Procedure referred to which provides that in such a case the complaint should be dismissed. I think, however, that it should not be dismissed with costs against the plaintiff for the reason that the widow insisted upon the trial and in her answer that she had the right to the possession of the whole of the premises during her entire life and the proof shows that she has occupied the same and the whole thereof ever since the death of her husband. A widow is endowed under the law with a *third* part only of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage. Real Prop. Law, § 190; Laws of 1909, chap. 52. She having occupied the entire property since her husband's death, and long after the widow's quarantine has expired, I think she is hardly equitably entitled to a bill of costs.

More than this the plaintiff as a tenant in common of a vested remainder in this property had the right under such section 1533 to commence the action, subject to the interest of the widow as the holder of the particular estate therein and subject to her right to object to a sale. Under such circumstances the plaintiff should not be charged with costs.

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ASSOCIATIONS — Continued
in connection therewith. On a trial of the charges before ten members of the national board of directors and officers of the national order, five of said members voted to sustain the charges and expel petitioner from the order, two in the negative and three not voting. On motion for a peremptory writ of mandamus to compel her reinstatement as a member of the subordinate court, held, that as under section 108 of the constitution, laws and rules of the order the five members of the trial body had no power under the facts and law to deprive petitioner of her membership in the order and take from her property rights which she owned therein, there being a mortuary fund connected with the order, her expulsion was illegal. The fact that K., while a trustee, was absent from six successive regular meetings and that the subordinate court had power to declare her office forfeited, in the absence of an explanation or excuse on her part, and the action of said court in selecting a successor to her to fill the office of trustee deemed vacant did not furnish sufficient grounds for the expulsion of petitioner, especially as she neither acted nor voted on that question except as she presided as grand regent at the meeting at which K.'s successor was elected and subsequently recognized such action as legal. That the subordinate court when it declared K.'s office forfeited acted within the scope of section 102 of the laws and rules of the national order which provides that "Any officer of a subordinate court absenting herself for three regular meetings in succession, unless excused by a majority vote of her court, shall forfeit her office," and that petitioner could control the vote upon such question, could not be successfully urged. Granting that upon a claim of the national body that it had always held that the only remedy which a local court had under section 102 of the laws of the order was to certify and declare that any officer named had been absent from three successive meetings and to ask the national order to declare the office vacant and that the appeal of K. was the first on just that point to come before said board of directors and that it had never accepted or sustained or maintained the right or authority in any local court to remove any member from office or expel any member for any cause whatever except for nonpayment of dues, the matter was within the jurisdiction of the national body, yet without a positive rule of action to guide the subordinate court its members might well understand conscientiously that the power was vested in them to declare an office vacant, especially in the circumstances of the instant case. That there being no authority in the constitution, laws or rules of the national body or subordinate court to remove the books and records of the local court to a distant part of the state, nothing more than a full right of examination being given to the superior body, the petitioner as grand regent could not be said to have the power to control the action of the local court having a membership of nearly 400, she not being responsible so far as the records disclose for the action of the court; if there had been a violation of the constitution, laws and rules of the national order it was not the action of the petitioner but that of the local court. Matter of Reed, 695.

See Mutual Benefit Societies.

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ATTACHMENT.

When order to vacate reviewable — Motions and orders — Appeal. —An order denying the motion to vacate the attachment is reviewable only on appeal from the final order made in the proceeding when the intermediate order is specified in the notice of appeal and necessarily affects the final order. Brand v. H. A. Improvement Co., 549.

ATTORNEYS.

See **Evidence; Fraud.**

AUTOMOBILES.

1. *Master and servant — Negligence — Evidence — Negligence of chauffeur.*— That a chauffeur by permission of his employer stops at his own home for supper on the way to the garage with the car does not remove him even temporarily from his employment. Where the chauffeur while taking the car back to the garage in Williamsburgh went by way of Broome street rather than by Delancey street, the distance between the two streets covering but a short city block, his act constituted a negligible deviation from the direct route but was without effect to suspend the course of his service to his master. Where, in an action against a physician for personal injuries caused by his automobile driven by his chauffeur, there was no evidence that he, after he had by permission of his master taken his supper at his own home, was engaged in other than his master's service in returning the automobile to the garage accompanied by his wife and mother-in-law, a charge to the jury, that if instead of turning to go toward Delancey street he started south toward Broome street the jury might infer that he was not proceeding by the nearest way to the garage for the purpose of storing the car and that if he was taking his wife and mother-in-law either for a drive or to visit some persons or to entertain them in any way he was not then employed in the business of defendant and defendant was not answerable for his negligence, is erroneous. Fisick v. Lorber, 574.

2. *Driving in violation of traffic ordinance — Contributory negligence — Damages.*— The act of the driver of plaintiff's automobile, who while driving twenty-five feet from the right hand curb in violation of a traffic ordinance twice gave a stop signal but stopped only after the second one, constitutes such contributory negligence as precludes a recovery for damages by defendant's automobile running into the rear of plaintiff's car. Russell v. Kemp, 582.

3. *Insurance against loss or damage caused by collision — Damages — Actions — Negligence.*—A policy insuring an automobile against loss or damage caused by collision provided that the insurer should be subrogated to all rights which the insured might have against any one by reason of loss or damage to the machine, and after it had been damaged in the collision through the admitted negligence of defendant, a street railway company, the insurance company settled with the owner who by a written instrument assigned and transferred to it all claims for damage to the machine subrogating the insurer to all his rights against defendant in that

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AUTOMOBILES — Continued.
regard. In an action brought by the insurance company against the railway company to recover for damages to the machine, held, that a release of the claim therefor given by the owner to the defendant who had actual notice of the assignment was not valid as against plaintiff though it had not given formal notice thereof to defendant. While separate actions, one for damages to property and another for personal injuries, may be brought by the same party it is customary to join such demands in one action, and the fact that the owner of the automobile brought an action against the street railway company to recover for personal injuries was a circumstance sufficient to put it upon inquiry as to what had become of the claim for damages to the automobile. Royal Indemnity Co. v. International R. Co., 670.

See **Evidence.**

BANKRUPTCY.

Trustee in — Action against creditor of bankrupt — Assignment for benefit of creditors — Offset.—An action against a creditor of a bankrupt for debt cannot be maintained either by his assignee for the benefit of creditors or by his trustee in bankruptcy in the name of such assignee. Where such an action was brought by the assignee for the benefit of creditors it may not be continued by the trustee in bankruptcy in the name of the plaintiff on the theory that defendant would have no right to offset a debt due it from the bankrupt and exceeding the amount of plaintiff's claim, whereas if an action were brought by the trustee in bankruptcy defendant would have the right to make such offset. Gilbert v. Mechanics & Metals National Bank, 364.

BANKS.

Determining title to assets remaining in — Bonds — Actions — Contracts.—Where negotiable bonds, loaned to a firm of stockbrokers for the purpose of being shown as part of its assets, were immediately hypothecated by it with its bank to secure its indebtedness, and the bonds were sold by the bank under a collateral agreement before notice from the owner who was not indebted to the stockbrokers, said owner, though not a party to an action against the bank by a customer of the stockbrokers, is bound by a decree therein made determining the title to the assets remaining in the hands of the bank under the collateral agreement. Gouert v. Mechanics & Metals National Bank, 374.

BAR.

What constitutes — Agreement as to new promise — Consideration.—Where parties agree that a new promise shall be a satisfaction of a prior debt or duty the new agreement is based on a good consideration and if accepted in satisfaction constitutes a bar to an action on the original debt. Hotaling v. Canton Art Metal Co., 525.

BASTARDY.

See **Penal Law.**

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BEQUESTS.

Of government bonds and bank stock — Income of securities accrued since death of testatrix.—A bequest of all government bonds and bank stock of which testatrix might die possessed carries with it all the income of such securities accrued since the death of testatrix. Matter of Franklin Trust Co., 71.

BILL OF PARTICULARS.

See Wills.

BILLS OF LADING.

See Carriers.

BOARDING HOUSE KEEPERS.

Landlord and tenant — Action for rent — Surrender and acceptance — Lien.— The language of the statute which gives a boarding-house keeper a lien for accommodations, board, lodging and extras furnished cannot be extended to cover future rent or damages under a yearly hiring of a room. Coe v. Haight, 603.

BROKERS.

Employment of, to procure purchaser of leasehold property — Action to recover commissions — Pleading — Contracts — Evidence. — The employment of a broker to procure a purchaser for a leasehold interest in real estate may be proven either by oral testimony or by a writing, and the contract is performed when the broker procures a purchaser ready, able and willing to take the property at the seller's terms. Where the complaint in an action by the broker to recover the agreed commission alleges facts showing plaintiff's performance and defendant's default in paying the commission, it will be assumed on appeal from a judgment for the dismissal of the complaint that its allegations are true. It was not essential to a recovery that plaintiff should prove the execution of a written contract between defendant and the intending purchaser. Wiederman v. Verschleiser, 276.

CARRIERS.

1. *Of goods — Action for damages — Trial — Interstate commerce commission — Verdict.*— Certain goods were packed by plaintiff in a car upon the tracks of, and delivered at Detroit for shipment to, a connecting carrier of defendant. The car upon its arrival in New York city, the place of delivery specified in the bill of lading upon which there was a notation "Car to be opened by consignee," was opened by defendant's employees, who, according to custom, proceeded to store the goods or otherwise handle them for delivery to the representatives of plaintiff. In an action for damage to the goods witnesses for plaintiff testified that in unloading the car some of the goods were thrown about and trampled on and the evidence on behalf of defendant was to the effect that the car had been improperly and carelessly loaded. Upon reversing a judgment entered upon a verdict in favor of plaintiff, held: That a request to charge that defendant having filed with the interstate commerce commission rules and regulations which provided that defendant should unload all cars consigned to the place mentioned in the bill

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CARRIERS — Continued.
of lading its connecting carrier had no authority to vary such regulation, correctly stated the rule as to the binding character of the tariffs and regulations filed with the interstate commerce commission and that the refusal to so charge was error. That as it appeared that the damage to the goods, if any, resulted not from the opening of the car but from the subsequent handling of the goods, it was also error to refuse to charge that "if the jury find that the damage was due to the improper packing by the shipper, the defendant is not liable," and "that unless the jury find that the damage occurred while the property was being unloaded by the defendant, the verdict should be for defendant," particularly as the only issues to be submitted to the jury had not been clearly laid down in the main charge. Greenwald v. New York Central & Hudson River R. R. Co., 122.

2. *Contracts — Evidence — Public Service Commissions Law*, § 38. —Where the holder of a ticket over a railroad from Tuxedo to New York city went to the baggage department of the station at Tuxedo and, upon asking the expressman to have his bag transferred to his house in New York city, was told that the transfer check would cost forty cents, which plaintiff paid and received a receipt therefor, the expressman taking possession of the bag which the railway company delivered to defendant, an express company, in New York city for delivery, the express company in handling the bag under the contract made at Tuxedo was engaged in intrastate commerce. Where the special delivery check was designed, as stated by the railroad rules and regulations, "for the checking of baggage from any line station to the residence, hotels, steamboat piers or railroad stations" and does so by direction of a passenger that his bag be transported at the end of the journey to his home, the railroad company receiving four cents of the total charge of forty cents for the service, the railroad company acted as agent for defendant, the express company. While a common carrier in the absence of special contract for a through shipment is not liable beyond the terminus of its own route, the railroad company was not liable to the passenger as upon a through shipment for loss of his bag while in the hands of the express company, as the special delivery check did not evidence a special contract. A local baggage carrier by rendering services connected with interstate passenger traffic in the transportation of baggage from a railroad terminal to residences, etc., in a city is not a common carier or express company subject to the provisions of the act to regulate commerce. Carmack Amendment, U. S. Stat. at Large, §§ 1905–1907, chap. 3591. The limitation in section 38 of the Public Service Commissions Law that the value of baggage carried in excess of $150 shall be stated upon delivery to the carrier which may make a reasonable charge for the accumption of such liability is not available to an express company which as agent of a railroad company upon receiving a passenger's bag fails to ask him to state its value. Noel v. Westcott Express Co., 154.

3. *Action against — Liability limited — Trial.*—Where on the trial of an action brought by an actor against a railroad company to recover for a trunk and contents lost during an interstate journey

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CARRIERS — Continued.
it appears that by arrangement between defendant and the company of which plaintiff was a member, in consideration of a reduced rate, the liability of defendant for the baggage of the members of the company was limited to $100, plaintiff cannot recover in excess of such amount. Lackaye v. Pennsylvania R. R. Co., 257.

4. *Of merchandise — Bill of lading — Actions — Interstate Commerce Law.*— Under the amendment of 1906 to the Interstate Commerce Law (Carmack amendment) a shipment of merchandise from New York to Texas is governed by the federal statute and regulations which supersede the state laws on the subject. Where defendant had no notice of any arrangement between the consignor and the consignee except such as could be inferred from the bill of lading, the goods having been billed straight were properly delivered to the consignee mentioned in the bill of lading without the production thereof. Where the goods were consigned to a symbol "M (M) C" in care of a bank for the alleged consignee the symbol in an inquiry as to who was consignee will be disregarded where it is admitted by both parties that it is nothing but a fictitious designation. Though a third person in whose care a package is addressed is clothed with the right to receive it, it does not follow that such delivery is the only good delivery relieving the carrier from liability. The consignor in an action to recover the value of the goods having failed to guard himself against delivery before payment by using an order bill of lading or notifying the carrier that the goods should not be delivered except on payment, defendant was not bound to know the arrangement between the consignor and the consignee. The symbol used in the present instance did not put the carrier on inquiry as to any arrangement between consignor and consignee as it would have had there been an order bill of lading. The goods having been shipped under a straight bill of lading and no notification appearing thereon of any arrangement between consignor and consignee, delivery to the consignee relieves the carrier from liability. Mayer v. Southern Pacific Co., 498.

5. *Assignment of bill of lading — Sales — Through rates.*— Plaintiff's assignor purchased from defendant 1,000 bales of cotton compressed at the shipside New Orleans, terms sight draft attached to the bill of lading. At the time of the purchase the cotton was stored in Texas uncompressed and at defendant's suggestion it was shipped on a through bill of lading direct to a customer of plaintiff's assignor who was advised by defendants that they had obtained a through rate and would deduct fifty-one cents for one hundred pounds to New Orleans and in fact deducted at the rate of forty-nine cents one hundred pounds. Held, that plaintiff's assignor was entitled to deduct from the invoice only so much as represented the actual rate charge including compression though it appeared that all the railroads except that by which the cotton was shipped charged sixty-one cents one hundred pounds for a like transportation. Kuerzi v. Maier, 537.

6. *Of merchandise — Express companies — Tariff rates — Value of package — Appeal.*—An express company, upon receiving a package in Brooklyn for transportation to a point in Central Park west, issued

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CARRIERS — Continued.
a receipt therefor containing no express limitation upon the carrier's liability but reciting that the package was received "subject to the classifications and tariffs in effect on the date hereof." The tariff duly filed by the express company provided that the rates governed by the classification of valuation charges were based upon a value of not exceeding fifty dollars on each shipment of 100 pounds etc. and that the liability of the company was limited to the value as given unless a greater value was declared at the time of shipment. Held, that in the absence of such declaration by the shipper his recovery for the loss of the package was limited to fifty dollars. The tariff rates of the express company did not give it an option to inquire as to the value of the package and to fix its rate and liability accordingly, nor did it import a waiver if no such inquiry were made. Where the objection that defendant did not prove that its tariff had been filed under all attendant technical requirements was not made at the trial, nor the matter called to the attention of the court or of the defendant, the defect in merely formal proof could not be availed of on appeal. Granbery v. Taylor, 585.

7. *Common — When acceptance of receipt does not establish contract — Actions.*—A common carrier may properly contract to restrict its liability by appropriate provision covering the due valuation of goods accepted for transportation and the presentation by the carrier and acceptance by the shipper of a receipt containing in appropriate type and language the expression of such limitation establishes a contract between the parties regardless of whether the shipper chooses to read it or not. Where a receipt for baggage is given by a carrier to a person actually traveling under circumstances which do not warrant the presumption that he will read the same, but rather implies that he accepts it as a mere voucher or token for the article delivered to the carrier, the mere acceptation of such a receipt does not establish a contract. Where in an action against a carrier for delay in delivering a trunk plaintiff to prove delivery puts in evidence the receipt issued by defendant, the receipt is in the case for all legitimate purposes. Lichterman v. Barrett, 594.

See **Negligence.**

CITY COURT OF UTICA.
See **Jurisdiction.**

CITY OF BUFFALO.
Provision of section 73 of city ordinances — Negligence.— Section 73 of the ordinances of the city of Buffalo which provides that "In excavating to adjoining premises, where there is not existing a retaining wall at the time of such excavation and in excavating to line of street curbs for any building or other purpose, to a greater depth than four (4) feet from grade — the party causing such excavation shall sheet pile with plank two inches thick, extending full width and from grade to bottom of excavation. The party causing such excavation and placing such sheet piling shall replace all damaged work and material, in as good condition as it was before excavation was commenced," and which was passed by virtue of

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CITY OF BUFFALO — Continued.
the provision of the charter of the city giving it power to prescribe general regulations for the erection of all buildings therein, is valid, and a violation thereof gives a cause of action. Where in walking near premises being excavated for the owner by an independent contractor plaintiff was injured by a cave-in which resulted from failure to "sheet pile" the excavation, as required by said ordinance, plaintiff has a cause of action against the owner of the premises and his failure to obey the ordinance is some evidence of negligence to be considered by the jury with the other facts and circumstances of the case. Bergen v. Morton Amusement Co., 647.

CITY OF NEW ROCHELLE.
Charter of, § 421 — *Fixing of district of assessment by common council — Municipal corporations — Actions — Code Civ. Pro.,* § 1638. — Under section 421 of the charter of the city of New Rochelle its common council in fixing a district of assessment to cover one-third of the expense of laying out a new street, the city to pay the balance, is under obligation to establish a district of assessment which shall contain all the real property which, in the judgment of the common council, is likely to be benefited by the improvement. In an action brought under section 1638 of the Code of Civil Procedure to cancel an assessment on plaintiff's property on the ground that it was illegal and void because made in excess of the jurisdiction of the common council in creating the district of assessment, it will be presumed that the common council did establish a district of assessment containing all the property likely to be benefited by the improvement and, in the absence of fraud or bad faith, its action is conclusive. Govers v. City of New Rochelle, 352.

CIVIL RIGHTS LAW.
See **Penalties.**

CODE OF CIVIL PROCEDURE.
§ 461. Guttilla v. Engel, 163.
§ 500. Mulinos v. Walkof, 165.
§ 522. Wiederman v. Verschleiser, 276.
§ 547. Guggenheim v. Guggenheim, 332.
§ 768. Buxbaum v. Paulsen, 717.
§ 829. Blumenthal v. Kelsey, 136.
§ 829. Janz v. Schwender, 142.
§ 829. Weiss v. Meyer, 145.
§ 835. Matter of Reinhardt, 413.
§ 873. Matter of Leland, 440.
§ 1319. Myers v. Klein, 546.
§ 1533. Green v. Lampman, 723.
§ 1638. Govers v. City of New Rochelle, 352.
§ 1678. Matter of Philip, 709.
§ 2564. Matter of Leland, 440.
§ 2615. Matter of Klumpf, 436.
§ 2681. Matter of Messing, 1.
§ 3135. Title Guarantee & Trust Co. v. Johnson, 101.
§ 3307. White v. Griffenhagen, 84.

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COMMISSIONS.
See **Brokers; Executors and Administrators.**

CONSTITUTIONAL LAW.
Tax Law, § 220 (6)—*Power of appointment—Transfer tax—Statutes.*—Section 220 (6) of the Tax Law which declares: "whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will," is constitutional when the power of appointment is exercised by will, even though the transfer would not be subject to the tax except for the exercise of said power. The question of the constitutionality of said statute, the power of appointment by deed and not by will not being entirely free from doubt, will be sustained on the ground that a statute should not be pronounced void by a court of first instance. Matter of Wendel, 406.

CONTEMPT.
1. *For disobedience of orders made by courts of sister states.*—Our courts will not punish as for contempt disobedience of the orders made by the courts of sister states. Mills v. Mills, 231.

2. *Special proceeding—Attachment—Municipal Court Code*, § 154 (2).—While a proceeding to punish for a contempt is a special proceeding, and the final order is appealable under section 154 (2) of the Municipal Court Code, no appeal lies from an order denying the motion of a witness to vacate an attachment against him where nothing was done thereunder except to release him from arrest upon giving security. Brand v. H. A. Improvement Co., 549.

CONTRACTS.
1. *In writing—When oral agreement without consideration.*—Where plaintiff and another in writing agreed with defendant to do the work of laying brick in the construction of a certain building, an oral agreement subsequently made between plaintiff and defendant to do the same work is without consideration and no recovery can be had thereon. Leibman v. Dean, 97.

2. *Of employment—Sales—Evidence—Appeal.*—Where plaintiff's contract of employment as a salesman provided that he should receive a stipulated amount each week irrespective of commissions earned, he is not a debtor for the deficiency of commissions and his drawing account may only be offset against commissions actually earned. Strauss v. Wolfsohn Co., Inc., 171.

3. *Breach of—Evidence—Application for aviator's certificate.*—The evidence in an action for breach of contract, containing no time limit, by which defendant agreed to furnish a machine and a competent teacher to give plaintiff lessons in the art of flying until he was competent to make application for an aviator's certificate, considered, and held, reversing a judgment in favor of plaintiff for failure of proof, that for all that appeared in the record defendant

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CONTRACTS — Continued.
was and ever since plaintiff took his twenty-fifth and last lesson has been ready to give him lessons at any time he might within reason apply therefor. Mitchell v. Heinrich Aeroplane Co., Inc., 222.

4. *When cannot be enforced — Pleading — Actions.*—Where the answer of one of the defendants after reaffirming the allegations of the complaint alleges an agreement between herself and the deceased husband of plaintiff whereby, in consideration of certain services alleged to have been rendered by her to said deceased husband, he agreed to leave to her whatever interest in the property he was entitled to at the time of his death, such agreement cannot be enforced in the present action; said defendant's remedy, if any, is by an action for breach of contract. Purdy v. Purdy, 369.

5. *When court may not change terms of — Damages — Evidence.* —A court may not change the terms of a contract even though it may be a harsh and unreasonable one; nor will the dictates of equity be followed if by so doing the contract will be ignored, for however onerous it must be enforced according to its terms. Where in an action to recover damages for failure to deliver merchandise defendant fails to offer evidence tending to show that certain conditions, terms, and specifications printed in small letters at the top of the order and above the description of the merchandise, that all terms of sale and deliveries were set forth in the copy of the order, were at any time called to the attention of plaintiffs or that they had accepted them, such conditions are not binding upon them. Cohen v. Walworth, 479.

6. *What necessary to make complete contract — Actions — Evidence.*— To make a written instrument, which is nothing more than an offer by defendants to purchase fertilizer, fixing price, quality, quantity, time and place of delivery, a complete contract, acceptance by act, or promise of plaintiff is necessary, and in an action to recover the purchase price of goods delivered thereunder defendants are entitled to show that it was agreed that an order for goods to be delivered March first might be canceled by defendants any time before that date, and the exclusion of such testimony on the ground that the writing contained a complete contract and that parol evidence was inadmissible to vary its terms, was error. Davidge v. Velie, 511.

7. *Recovery for breach of — Wrongful discharge from employment — Evidence — Damages.*— Upon the wrongful discharge of one employed at a weekly salary he is entitled to recover as damages for breach of the contract such a sum as it is reasonably certain may follow such breach, determinable approximately by a jury upon reasonable conjecture and probable estimate. Ordinarily the damages recoverable in an action for wrongful discharge from employment would presumptively be the amount of the plaintiff's salary due at the time of the trial, less his actual earnings up to that time and those that would become due after the trial being reduced by the amount of his future earnings. The fact that plaintiff after his discharge became ill furnished no presumption in the absence

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CONTRACTS — Continued.
of proof of the character of the illness, that it would have arisen had he continued in the employ of defendant, or that it would have justified a suspension of payment on the part of the employer. Where there was not a scintilla of proof which would have justified the jury in finding that had plaintiff continued in defendant's employ he would have been unable to perform his contract, and it appears that he made all reasonable effort to obtain other employment and failed to do so, it was error to give judgment only for the amount of salary plaintiff would have earned for three out of the seven weeks of the unexpired term of the contract broken by defendant. Marx v. New York Ribbon Co., 551.

8. *Covenants of — Breach of — Failure to fix terms for continuance of agreement — Actions — When unenforcible — Appeal.*— Plaintiff was employed by defendant to go to a certain territory and there hire salesmen, put them out to sell goods and as soon as a check writer got there they were to sell check writers. The check writer to be there about the first of February and plaintiff's commission was to be fifty per cent, and forty per cent was to be paid to the salesman. Held, that in the absence of any covenant on plaintiff's part either to purchase a definite number of the articles to be supplied defendant or to continue his services for any definite period acquiesced in by defendant there was no enforcible contract. The failure of the parties to fix any terms for the continuance of the agreement left it as one terminable at will. In an action for breach of the alleged contract defendant on motion to dismiss the complaint on the ground that the contract was too indefinite and uncertain might urge the absence of a specified term for its continuance. Even if on defendant's motion to dismiss the complaint the points that the contract was unenforcible because of the absence of a covenant on plaintiff's part to purchase a definite number of articles from defendant or to continue in its employ for a definite period were not separately and clearly urged, defendant was entitled to avail itself of them on appeal from a judgment in favor of plaintiff since the objections were not to a defect in formal proof but that plaintiff had failed to establish a cause of action. Sigsbee v. New Era Manfg. Co., 579.

9. *Failure to establish contractual relations — Evidence — Corporations — Judgments.*— Where in an action to recover for services rendered and goods sold and delivered the evidence is entirely consistent with the claim of defendant that its connection with a corporation with which all the dealings with plaintiff were had was simply that of one who had advanced money under a trade agreement, which was the fact, and plaintiff fails to establish either directly or indirectly any contractual relations with defendant, and it appears that the agreement between plaintiff and the corporation confirmed by their correspondence did not contemplate any liability on the part of defendant but that exclusive credit was given to the corporation, a judgment in favor of plaintiff will be reversed and the complaint dismissed. Gagen v. Butler, Inc., v. Franco-American Chemical Co., Inc., 625.

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CONTRACTS — Continued.

10. *For building loan — Must be in writing — Mortgage — Liens.*— A contract for a building loan is an agreement by which one undertakes to advance to another money to be used in the erection of a building. Where at the time of an advance of $1,500 on a bond and mortgage given to a savings and loan association to secure a loan of $5,500 on a half completed house nothing whatever was said or agreed upon as to how the money advanced should be used by the mortgagor, the transaction was not a contract for a building loan within the meaning of section 22 of the Lien Law which provides that such a contract must be in writing and duly acknowledged and within ten days after the execution thereof be filed in the office of the clerk of the proper county. There being nothing in the agreement between the parties as to how the balance of the loan should be used, the case was covered by section 13 of the Lien Law which provides that "a lien for materials furnished or labor performed in the improvement of real property shall have priority * * * over advances made upon any mortgage or other incumbrance thereon after such filing" that is, filing of notice of lien. Sullivan v. Young, 658.

11. *Written agreements — Partnership — Actions — Evidence.*—A written agreement under which plaintiff took charge of the restaurant part of defendant's business in consideration of which he was to receive as compensation a certain percentage of the net earnings of the entire business, the amount to be paid plaintiff for services to be determined upon an accounting each month, does not create a partnership between the parties, plaintiff having no financial responsibility in connection with the business or title to any of the stock or fixtures used therein. The fact that an action on contract seeks an accounting does not make it an equitable one requiring determination at the Special Term and the case should be sent to the Trial Term. While the fact that the parties held themselve out as partners erecting an electric sign with their joint names thereon might be evidence to create a liability of both parties to creditors such acts did not change the contractual relation from one of employment to one of partnership. Heck v. Voelkle, 692.

See **Actions; Agency; Carriers; Corporations; Husband and Wife; Injunctions; Pleading; Specific Performance.**

CONVERSION.

1. *Action for damages for — Presumption of lawful possession — Evidence.*—Where in an action to recover damages for the conversion of certain brass journal railroad bearings which bore the initials of certain railroad companies, including defendant, and part of which was at one time its property, it appears that plaintiff bought the property from a regular dealer in such articles the presumption that plaintiff's possession was lawful may be rebutted only by affirmative proof that the one who sold the brass to plaintiff never had title thereto. Muhlstein v. New York Central R. R. Co., 214.

2. *Of corporate stock pledged as collateral security for loan — Corporations — Damages — Evidence.*— Where a transaction constitutes a pledge of corporate stock as collateral security no stamps

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CONVERSION. —Continued.
as required by sections 270–279 of the Tax Law need be affixed to the stock certificate, but if the stock was sold outright the omission to affix the stamps constitutes an evasion and violation of the statute, and in an action to recover damages for the conversion of corporate stock, which plaintiff claims was pledged as security for a loan but which defendants claim was sold outright, evidence is admissible to show whether there was a sale of the stock or whether it was pledged, no stamps being affixed to the stock certificates when offered in evidence and no proof offered that the tax on the transfer had been paid. If the transaction were in fact a sale failure to affix the stamps as required by statute did not render the sale invalid. Hall v. Davis, 315.

3. *Evidence held not to sustain counterclaim for storage.*— Evidence in an action for the conversion of a piano that when defendant, a boarding-house keeper, refused to deliver it to plaintiff on demand no claim was made for storage but only for damages for plaintiff's failure to retain a room for a year does not establish a lien for storage pleaded as a counterclaim. Coe v. Haight, 603.

CORPORATIONS.

1. *Negotiable instruments—When not accommodation makers of note — Trial.*—Where a corporation becomes a party to negotiable paper for accommodation, the burden is upon the holder of showing that he became such for value and without notice that the corporation was an accommodation maker. In an action on the note, evidence that the corporation gave it to one of its debtors under an arrangement pursuant to which it took a mortgage on the payee's machinery, tools, etc., and an assignment of accounts together with certain notes of the payee received in exchange for the note in suit, by which arrangement it was hoped that defendant through financial assistance given the payee would receive full payment of its indebtedness to defendant, if believed by the jury, would authorize a finding that the note in suit was not an accommodation note, upon which finding plaintiff, a holder for value, would be entitled to recover. Durbrow v. Swedish Iron & Steel Corp., 160.

2. *Insolvency — Services — Contracts.*— Plaintiff, acting for and on behalf of an insolvent corporation under a contract made through its attorney before defendant was appointed custodian of its assets, obtained a purchaser therefor. Held, that when plaintiff had proven his claim for the agreed compensation for his services he would be in a position to enforce it against the proceeds of the sale of the assets in the hands of defendant as trustee for the creditors of the corporation. Gleeson v. Umans, 177.

3. *Assignment of account for goods sold and delivered — Evidence — Stock Corporation Law,* § 66.— In the absence of proof that a corporation had refused to pay any of its obligations or that it was insolvent or that its insolvency was imminent, an assignment by it of an account for goods sold and delivered to one of its officers and stockholders does not violate section 66 of the Stock Corporation Law. Weiser v. Marmalax Manfg. Co., Inc., 530.

See Conversion; Negligence.

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COSTS.

Appeal — Code Civ. Pro., § 461.— Under section 461 of the Code of Civil Procedure which is not inconsistent with the Municipal Court Code and which provides that one granted leave to sue as a pauper shall not be prevented from prosecuting the action by reason of his being liable for the costs of a former action brought by him against the same defendant, an order granting a stay in the action until payment of costs awarded to defendant on dismissal of the complaint in a former action between the same parties involving the same cause of action is unauthorized and will be reversed and the motion denied. Guttilla v. Engel, 163.

COUNTY COURT.

See **Jurisdiction.**

CRIMINAL LAW.

1. *Arrest by private person without a warrant — Delivery to peace officer — Information laid after arrest charging petit larceny — Penal Law*, §§ 1290, 1298.— A private person who without a warrant has arrested another for a crime committed in his presence may deliver him to a peace officer whose right to take the offender into custody without a warrant is a continuation and part of the original right to make the arrest without a warrant. Where in such case the offender was brought before a magistrate it is unnecessary for him to make out or issue a formal warrant, the only office of which is to authorize and direct the arrest of one charged with having committed a crime. Where one arrested without a warrant is taken before a magistrate who prepares an information upon which the defendant is arraigned and upon a plea of not guilty goes to trial and the evidence is sufficient to establish his guilt the judgment of conviction will be affirmed as against the contention that the magistrate acquired no jurisdiction because at the time defendant was taken before the magistrate no information had been made or filed; even if defendant's arrest had been illegal the magistrate acquired jurisdiction when the information was taken and defendant was arraigned to answer the charge contained therein. An information accusing defendant of having "unlawfully, willfully and feloniously taken, stolen and carried away" a certain number of chickens in violation of sections 1290 and 1298 of the Penal Law held to have the same effect as if said sections had been fully incorporated in the information. People v. Ostrosky, 104.

2. *Indictment for manslaughter — Violation of Labor Law — Criminal responsibility of owner of tenant factory for death of one as result of fire therein.*—An owner of a "tenant factory" within the meaning of the Labor Law who may not personally participate in the violation of said statute or who may be without knowledge of its violation by his or her agent may be guilty of a misdemeanor in failing to affirmatively see that the provisions of the statute are complied with in respect to his or her property. People v. Diamond, 114.

3. *Evidence insufficient to convict defendant of being common prostitute.*—Where though police officers testify that the place

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CRIMINAL LAW — Continued.
where they arrested defendant, charged with being a common prostitute, had the reputation of being a disorderly house the evidentiary facts brought out on the trial are insufficient to prove either that she was such a character or that she had no lawful employment whereby to maintain herself, and there is not the slightest suggestion in the evidence that she made an indecent proposal or acted in a lewd or indecent manner, her conviction will be reversed and a new trial ordered. People v. Ward, 508.

See **Witness.**

DAMAGES.

1. *Easements — When entitled to recover — Abatement of nuisance.*— On a claim for damages to easements of light, air and access plaintiff is not entitled to recover for a diminution in value of his premises based on the assumption that the nuisance is to continue forever and at the same time have judgment of abatement and removal of the nuisance, but his recovery should be limited to the loss of rentals sustained up to the commencement of the action with the right of successive actions of damages until the abatement of the nuisance. Hellinger v. City of New York, 394.

2. *Personal liability of owner excavating property — Contracts.*— At common law the owner of land contiguous to that of another is entitled to the right of support, and when excavation is made and this right of support is taken away and damage results to the adjoining owner the owner making the excavation must make good the damage. This natural right of support as between owners of contiguous lands existed in respect of lands only, and not in respect of buildings or erections thereon, but by statute (Laws of 1855, chap. 6) this duty of protection was extended to buildings and other erections in the city of New York. The duty to properly protect the land or soil of contiguous property where excavations are made adjoining is an absolute one, and the owner of the property excavated cannot absolve himself from personal liability for damages resulting from inadequate protection against cave-ins by contracting with a third party for doing the work, and in such contract providing that the contractor shall properly shore and protect the adjoining poperty. Bergen v. Morton Amusement Co., 647.

See **Contracts; Conversion.**

DECEDENTS' ESTATES.

Mortgages — Sale of real estate by administrator for payment of debts — When proceeding to sell defective — Executors and administrators — Title.—Where an heir at law of a decedent gave a mortgage upon all his right, title and interest in the estate of decedent sold by his administrator for payment of debts and the mortgagee was not served with a citation in the proceeding to sell the land for payment of debts, the proceeding is defective and a motion made upon the judicial settlement of the account of the administrators to compel the purchaser to take title to the land will be denied, but the purchaser may not be granted affirmative relief. Matter of Anderson, 79.

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DEFAULT.

1. *When entitled to have default opened without terms — Calendar — Trial — Actions.*— Nine separate actions to recover on policies of fire insurance appeared on the calendar of Part I of the trial court, numbered in consecutive order. The trial of the first cause being unfinished on the last day of the term all of the cases with the assent of plaintiff's counsel were adjourned to Part II. Held, that in the absence of due service of notice of trial defendant was not entitled to take plaintiff's default in appearance or refusal to proceed with the other actions after the conclusion of the trial of the first case and that plaintiff was entitled to have his default opened without terms. Even had the default been properly granted, a requirement that plaintiff should stipulate to try the other actions as one deprived him of a substantial right and could not be properly imposed as part of the terms for opening the default. Wolfert v. Liverpool & London & Globe Insurance Co., 522.

2. *Judgment by — Motion to open — Municipal Court of city of New York — Code Civ. Pro.*, § 1913.—Where it admitted that the object of an action instituted in plain violation of section 1913 of the Code of Civil Procedure upon a judgment by default was to increase the amount of the judgment so that supplementary proceedings could be instituted thereunder, the entry of the second judgment is unauthorized, but defendant has no standing in court except to move to open his default. Myers v. Klein, 546.

DEEDS.

See **Specific Performance.**

DEFICIENCY.

See **Foreclosure.**

DEPOSITIONS.

Examination before trial — Evidence — Code Civ. Pro., § 873.— Where on allegations that one named as executor in a will was physically and mentally incapable of performing the duties of executor objections were filed to the issuance of letters testamentary to him, and it does not appear from the moving papers that his testimony if taken before the trial would be used upon the trial of the issue raised by the objection, and that an examination as to his mental capacity can be conducted as effectively on said trial as on an examination before trial under section 873 of the Code of Civil Procedure, the application for an examination into the matter before trial will be denied. Matter of Leland, 440.

DEVISE.

See **Wills.**

DISCONTINUANCE.

Practice in Supreme Court as to right of suitor to discontinue — Motions and orders — Actions.— The practice in the Supreme Court as to the right of a suitor to discontinue an action commenced by him applies to the Municipal Court of the city of New York. No judgment may be entered on an order granting a motion for the discontinuance of an action. Where a motion by plaintiff to dis-

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DISCONTINUANCE — Continued.
continue an action brought in the Municipal Court of the city of New York is granted, the clerk must tax the costs fixed by the statute. Under section 125 of the Municipal Court Code a plaintiff who has been granted leave to discontinue an action may not begin a new action until payment of the costs taxed on said motion. Where upon the discontinuance of an action on plaintiff's motion he failed to pay the costs as taxed, defendant may move for a dismissal of the case under section 126 of the Municipal Court Code. Through a judgment for costs entered in favor of defendant upon granting plaintiff's motion to discontinue an action is irregular, defendant is not injured and may not appeal from the judgment. Levy v. Metropolitan Life Ins. Co., 556.

DISCOVERY.
In Surrogate's Court — When not entitled to jury trial.— The petitioner in a discovery proceeding in the Surrogate's Court is not entitled to a jury trial as matter of right. Matter of Callahan, 438.

DISPUTED CLAIMS.
See **Statute of Limitations.**

DOMICILE.
How determined — Wills — Probate of will not conclusive adjudication of last place of residence of testatrix.— The status of a widow, for the purposes of the Transfer Tax Law, is determined by her residence in fact at the time of her death. In a proceeding under the Transfer Tax Law the place of probate of a will is not a conclusive adjudication as to the last place of residence or last domicile of testatrix. Matter of Morgan, 451.

DOWER.
Action for — Pleading — Husband and wife — Contracts.—Where it does not appear from the pleadings in an action for dower that there was any trust in the lands in favor of plaintiff's deceased husband, and it is clear that he had neither the actual seizin of the property nor a legal right to actual seizin during coverture, a motion for judgment on the pleadings made by defendant must be granted. Purdy v. Purdy, 369.
See **Fraud; Petition; Wills.**

EMPLOYERS' LIABILITY ACT.
See **Negligence.**

ESTOPPEL.
Surety bonds — Default — Action on bond — When time for filing further proofs expired.— Where a surety company bond required that the surety should be given written notice within forty-eight hours after any default on the part of the principal in making payment for materials furnished and not later than thirty days after any such default to file with the surety "written proofs" of the principal facts, a letter advising the surety of an alleged default and requesting an immediate payment of the amount not paid, otherwise proceedings to enforce collection would be commenced, is sufficient "written proofs" within the condition of the

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ESTOPPEL — Continued.
bond in the absence of proof that defendant in an action on the bond notified plaintiff that it deemed the letter insufficient, and the time for filing further proofs having expired defendant was estopped from claiming that said letter was insufficient. Fass v. Illinois Surety Co., 267.

See **Assignment for Benefit of Creditors; Insurance (Life).**

EVICTION.
See **Landlord and Tenant.**

EVIDENCE.
1. *In action against administrator — Code Civ. Pro.*, § 829.— In an action against an administrator, appointed as the successor of a deceased administrator, the testimony of plaintiff as to conversations with the deceased administrator is incompetent under section 829 of the Code of Civil Procedure. Blumenthal v. Kelsey, 136.

2. *In action to recover value of goods delivered and alleged to be lost.*— Where, on the trial of an action to recover the value of a case of goods delivered to defendant and alleged to have been lost through the criminal complicity of defendant's driver with other persons, plaintiff's shipping clerk as a witness was unable to state the amount or character of the goods included in the shipment, the introduction in evidence, over objection, of a paper alleged to be a copy made by the bookkeeper of an entry in the books, which was alleged to have been made in turn from a shipping slip made out by the shipping clerk, is error, no proper foundation having been laid. A contention that the error was not material, or at all events that no stress was laid thereon by the opposing counsel, considered, and held untenable. Blum v. Davis, 140.

3. *When entitled to most favorable inference — Burden of proof.* — It was no part of plaintiff's case to affirmatively show that employment was sought for and could not be found, and although his testimony as to efforts in that regard were contradictory he was entitled to the most favorable inferences of which the evidence was capable, on appeal from a judgment dismissing the complaint, as the burden of proof was on defendant to show that plaintiff had procured or could have found other employment. Strauss v. Wolfshon Co., Inc., 171.

4. *Credibility of witness — Corporations — When new trial may not be granted.*— While a party has a right to contradict the testimony of his own witness he may not impeach his credibility. In an action against a corporation, the original certificate of its incorporation executed more than a year before the trial and disclosing that a witness for plaintiff, who testified that he was not a director at the time when certain admissions in regard to the collection of moneys were made by him, was one of the original directors was not newly discovered evidence for which a new trial may be granted, it appearing that if plaintiff thought he would need it he could have "discovered" the said certificate before the trial. Where a

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EVIDENCE — Continued.
party chooses to rely on an adverse witness to supply a necessary link in his clain of evidence and then finds that his confidence was misplaced, he should not be granted a new trial to supply other evidence which he could have obtained at the trial. Hanauer v. Bradstreet's Collection Bureau, 211.

5. *In action against executors for conversion considered — Conversion.* — Evidence in an action against the executors of plaintiff's brother for the alleged conversion of certain shares of stock claimed by her considered, and held to show title thereto in defendants by reason of plaintiff's sale of the stock to her brother in his lifetime. Hall v. Davis, 315.

6. *When statements of inmates of disorderly house admissible — Criminal law — Tenement House Law,* § 150. — On a charge of keeping and maintaining a house of prostitution in violation of section 150 of the Tenement House Law statements of the inmates made in the absence of defendant are admissible, not as tending to establish defendant's knowledge of the disorderly character of the house but as tending to prove it was, as a matter of fact, a house of prostitution. Statements of a codefendant, an employee of defendant, made in her presence and in the presence of the police officer who made the arrest, making a direct accusation against defendant, are admissible though she remained silent. Evidence as to whether the premises were being conducted as a disorderly house to the knowledge of defendant considered, and held to present a question of fact and that the determination of the magistrate thereon in convicting defendant was not against the weight of evidence. People v. Claffy, 400.

7. *When declarations by decedent competent — Common law marriages — Husband and wife — Attorneys — Code Civ. Pro.,* § 835. — The petitioner claimed that she was the wife of decedent by an agreement between them made on or about July 9, 1915, and that thereafter and until the decedent's death she remained his lawful wife. No evidence of a ceremonial marriage or of a compliance with chapter 339 of the Laws of 1901 was produced, and it was urged that since the passage of the act above referred to so-called common-law marriages no longer exist in this state and, second, that if they do exist the evidence fails to warrant a finding that the petitioner was the wife of the decedent. The evidence in the case examined and analyzed, and in denying the application, Held, (1) that declarations by the decedent to the effect that he was not married, relating as they did to pedigree, were competent; (2) That while the fact that petitioner was making arrangements to have a religious ceremony performed, and even her statements and those of the decedent to the effect that they were not married, might, if standing alone, be consistent with the existence of a marriage contract on the theory that the statements referred to a ceremonial marriage, they should not be so construed in the light of the claim for reimbursement for services rendered to the decedent made by the petitioner through her attorney after the death of the decedent as the latter claim is entirely antagonistic to and irrecon-

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EVIDENCE — Continued.
cilable with the claim of the petitioner that she was the wife of decedent. (3) That the introduction of the letters setting up said claim did not violate the prohibition contained in section 835 of the Code of Civil Procedure which does not prohibit an attorney at law from testifying as to the communications made by his client to him or his advice given thereon in the course of his professional employment, but provides only that he shall not be permitted to disclose such a communication and, when the same has already been disclosed with the acquiescence or consent of the client, the testimony is competent and is not prohibited by the section in question. (4) That the petitioner's attorney was at least her agent and she is chargeable with admissions contained in his letters written in the course of his employment; (5) That the presumption of marriage when it once arises is a strong one, but it is certainly rebuttable, and when the uncontradicted testimony of unimpeached witnesses and the subsequent acts of the alleged widow are such as to convince the court that no contract was made between the parties, the presumption is overcome; (6) That the petitioner was required to establish her status in this court and a fair preponderance of the evidence on this issue is against her contention. Matter of Reinhardt, 413.

8. *When inadmissible — Automobiles — Damages.*— Where plaintiff's automobile was damaged in a collision, and in his bill of particulars the only damages stated were to his car, testimony as to the cost of hiring another and a chauffeur, while his own was being repaired, is inadmissible. Nechamkin v. Kennedy, 532.

9. *When admissible — When entitled to introduce proof in contradiction of testimony as to acceptance — Pleading — Costs — Municipal Court Code,* § 93(2).— Where the answer in an action for the breach of a contract for the sale and delivery of goods is a general denial, evidence on behalf of defendant tending to show that goods delivered were not in accordance with the contract is admissible. In such case defendant is also entitled to introduce proof in contradiction of plaintiff's testimony as to acceptance of the last delivery of the merchandise without raising the objection that they were not in accordance with the contract. The imposition of costs as terms of granting an amendment to the answer, no claim being made of surprise or prejudice, was not "just" within the meaning of section 93(2) of the Municipal Court Code, nor a proper exercise of discretion, as the evidence sought to be introduced was admissible under the general denial. Levine v. Kosher Matzoths Baking Co., Inc., 565.

10. *When incompetent — Trade customs.*— A loose sheet from defendants' order book purporting to show their account with plaintiff is incompetent in the absence of proof as to the manner in which the book was kept or that the book from which the leaf was taken accurately recorded all transactions in connection with defendants' business covering the period in question. Evidence of defendants' usual custom of requiring a written confirmation of an order

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EVIDENCE — Continued.
for goods is insufficient to establish a trade custom binding on plaintiff and not shown to be within his knowledge. Brook v. Levinson, 567.

See **Brokers; Contracts; Conversion; Criminal Law; Goods Sold and Delivered; Husband and Wife; Negligence; Savings Banks; Wills; Witness.**

EXECUTORS AND ADMINISTRATORS.

1. *Judicial settlement of accounts — Rejection of disputed claim — Code Civ. Pro.*, § 2681.— Where no written consent that a disputed claim against decedent's estate be heard and determined upon the judicial settlement of the accounts of the executrices has been filed in the surrogate's office, and no action upon said claim has been brought within three months after its rejection, a motion to dismiss the claim which was rejected July 20, 1915, at which time section 2681 of the Code of Civil Procedure as amended in 1914 was in force, must be denied, and the claim be tried and determined on the judicial settlement. Matter of Messing, 1.

2. *Accounting — Proceeds of policy of life insurance — Charge for funeral expenses not justified.*— An industrial life insurance policy taken out by the decedent was under the application accompanying and made a part of it payable to his first wife, who predeceased him. The accountant, decedent's second wife, received from the insurance company the proceeds of this policy as administratrix, but did not charge herself therewith in her account as filed, and claimed that she was entitled to the same as the wife of the insured. There was no new designation of the beneficiary after the issuance of the policy and the death of the decedent's first wife. The accountant also received a death benefit applicable to the payment of funeral expenses, credited herself with the payment of such expenses, but did not charge herself with the amount of the same. On objections filed, Held, that while the deceased used the term "wife" in the application, the fact that he inserted the name of the person who was his wife when the application was made showed that he intended the beneficiary to be the latter and not the accountant; that the payment by the insurance company under the terms of the policy did not make the moneys paid the property of the person to whom the company elected to pay the same; that the provision for such payment is only for the protection of the insurance company but does not grant or take away a cause of action from any person; that upon the death of the first wife her rights under the policy ceased and passed to her husband and upon the latter's death it became a part of his estate; and that as the accountant came into possession thereof and is his administratrix she should account for it as such. Also, Held, that the charge against the estate for funeral expenses was not justified. Matter of Shanley, 427.

3. *Application for order directing physical examination of executor denied — Code Civ. Pro.*, § 2564.—As physical infirmity is not one of the disqualifications mentioned in section 2564 of the Code of Civil Procedure which specifies the various causes which render

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EXECUTORS AND ADMINISTRATORS — Continued.
a person incompetent to receive letters testamentary, an application for an order directing a physical examination of one named as executor in a will must be denied. Matter of Leland, 440.

4. *When not entitled to commissions — Taxable assets.*— The executors are not entitled to commissions unless they exercise the power of sale and such commissions should not be deducted from the taxable assets of the estate at this time. Matter of Browning, 459.

5. *When entitled to have commissions deducted upon entire estate — Transfer tax.*— Executors, in a proceeding to fix a transfer tax, are entitled to have deducted their commissions upon the entire estate and also commissions upon such portion of the estate constituting a trust fund to be held for testator's wife. Matter of Goodwin, 461.

6. *Accounting — Legacy — Wills — Statute of Limitations.*— Among the papers of a testator who died in 1896, bequeathing $1,000 to his sister, the executors found a note for $1,000 dated September 16, 1886, signed by her and payable to testator. The executors filed their account in 1900, but no action was brought to compel the payment of the note and the decree on accounting, which made no provision for the payment of the legacy, expressly provided that the executors should retain a certain sum to pay any judgment which might be obtained in any action or proceeding brought to recover the legacy. On the judicial settlement of the account of the executors, on their request for instruction as to whether they should pay the legacy to the legal representatives of testator's sister who died in 1914, held, that the court could not make a judicial determination of the issue; that the executors must be left to their own discretion as to the advisability of paying the legacy or settling their account upon the assumption that the legacy had been satisfied, or was barred by the Statute of Limitations. Matter of Harper, 464.

See **Accounting; Trustees.**

FALSE IMPRISONMENT.

Action for — Pleading — Criminal law.—A complaint alleging that while defendant, a city marshal, was making a levy under an execution against one person he levied on and seized the property of another and upon being informed by plaintiff that said property belonged to his employer falsely and maliciously charged plaintiff with interfering with him and caused his arrest and by direction of defendant was imprisoned and restrained of his liberty without reasonable cause and without any right or authority, states a cause of action for false imprisonment. The complaint further alleged that defendant falsely and maliciously charged plaintiff with using threatening, abusive and insulting behavior with intent to provoke a breach of the peace and that plaintiff was arraigned on said charge before a police magistrate and duly tried and the charge dismissed. For a separate defense the answer alleged that while defendant, as marshal, was attempting to levy an execution upon

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FALSE IMPRISONMENT. — Continued.
personal property of a judgment debtor plaintiff and others interfered with him in the performance of his duty; that defendant called a police officer in whose presence plaintiff continued to interfere with defendant and committed a breach of the peace, whereupon the police officer arrested plaintiff and took him before a magistrate who discharged him. There was no denial of any of the allegations of the complaint incorporated in the separate defense though they were denied by the answer. Held, that as there was no denial of the allegation of the complaint that defendant caused plaintiff's arrest, the separate defense was subject to demurrer for insufficiency. That defendant had reasonable cause to believe that plaintiff had committed a breach of the peace, as alleged, was no defense, and although it might affect the damages it would not justify the imprisonment of plaintiff. Mulinos v. Walkof, 165.

FALSE REPRESENTATIONS.
See **Pleading.**

FEES.
Of sheriff in collecting from judgment debtor — Supplementary proceedings — Code Civ. Pro., § 3307.—A sheriff in collecting from a judgment debtor the sum set forth in a warrant issued against him in proceedings supplementary to an execution, and under which he was arrested, acts under an attachment for the payment of money (Judiciary Law, § 762) and is entitled to deduct his fees or poundage from the amount collected as provided by section 3307 of the Code of Civil Procedure. White v. Griffenhagen, 84.

FORECLOSURE.
1. *Mortgages — To what receiver of rents, etc., entitled — Contracts.*— The receiver of the rents, issues and profits under a foreclosure of a mortgage on an apartment house is not entitled as against the mortgagor to telephone tolls collected from the tenants for messages sent to the exchange located in the building, as the money so received was not earned by the real estate but under a contract with the telephone company. Such receiver is, however, entitled as against the mortgagor to the amount collected for electric current furnished to the tenant from a plant which was a part of the realty. Fifty-Ninth Street Real Estate Co. v. Murphy, 191.

2. *Of mortgages — Sale in — What constitutes primary fund for payment of mortgage debt — When sale set aside — Liens.*— Mortgaged premises constitute the primary fund for the payment of the mortgage debt and only where the mortgagee has endeavored to collect the same out of the land can a just judgment for deficiency be entered. Upon a sale on the foreclosure of a mortgage for $950 upon several pieces of property in which the equity was sworn to be from $5,000 to $12,000, plaintiff bid in the property for $1,300 and entered a deficiency judgment for $1,085.93 because under his bid there was not enough money to discharge back taxes and water rents amounting to $1,191.69, expenses of sale $87.50, and unpaid costs $20.81. The prior liens against said premises exclusive of

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FORECLOSURE — Continued.
unpaid interest amount to $12,800. On motion to set aside the sale, held, that plaintiff having neglected to foreclose against one of the properties was in no position to enter a judgment for deficiency, and that the sale should be set aside and a resale ordered on the ground that the price at which plaintiff bid in the property was grossly inadequate. Purdy v. Wilkins, 706.
See **Railroads.**

FRAUD.
Attorneys — Dower — Sale of infants' real estate — When claim dismissed.— Decedent herein was the attorney for petitioners in a certain proceeding for the sale of infants' real estate who derived their title from one W., and was also his attorney in an action for divorce brought by him in which no final decree was entered because of his death within three months of the docketing of the interlocutory decree in his favor. In the proceeding for the sale of the infants' real estate decedent herein, who was one of their general guardians, testified that at the time of his death it was unmarried, and the other general guardian, a sister of it, testified that he was a single man at the time of his death and that there was no one who had any dower right in the property. After claimant had purchased the property he discovered that it was still subject to the dower interest of W.'s widow who was living. Held, that it not appearing that decedent intended to mislead or defraud and not having profited by the misrepresentations, a claim against his estate for alleged fraud will be dismissed. Matter of Cushman, 9.

GENERAL BUSINESS LAW.
See **Pawnbrokers.**

GIFTS.
Subject of — Direction to executors or trustees to pay or divide — Where future interest is devised — Wills.—Where there is no gift but a direction to executors or trustees to pay or divide and to pay at a future time, the vesting in the beneficiary will not take place until such time arrives. Where a future interest is devised, not directly to a given person, but indirectly through a power conferred upon trustees, the devise is designed to be contingent and survivorship at the time of distribution is an essential condition to the acquisition of an interest in the subject of the gift. Matter of Vander Roest, 21.

GOODS SOLD AND DELIVERED.
1. *Action for — Evidence insufficient to establish delivery — Code Civ. Pro.*, § 829.— In an action for goods sold and delivered, proof that they were packed in boxes by plaintiff who rendered a correct bill therefor and, upon sending the boxes back by the delivery boy to defendant with the original bills and the order slip, received receipts initialed by defendant's clerk and checked by her but only as to prices, is insufficient to establish delivery of the goods. In such action testimony of plaintiff as to conversations with defendant's deceased partner bearing on the question of the value of the

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GOODS SOLD AND DELIVERED — Continued.
goods is inadmissible under section 829 of the Code of Civil Procedure. Weiss v. Meyer, 145.

2. *Action for — Agent not liable to trustee in bankruptcy for value of goods.*—An agent of a hotel corporation who obtains for plaintiff, another corporation, at the request of its president an order from his principal for the purchase of goods to be paid for by giving credit for board and lodging of said president, is not liable to the trustee in bankruptcy of plaintiff for the value of the goods. Biglow v. Presbrey Co., 175.

"GOOD WILL."
See **Partnership.**

GREATER NEW YORK CHARTER.
Sections 799, 800 — *Construction of — Reinsurance.*— Sections 799 and 800 of the Greater New York Charter (Laws of 1901, chap. 466) should be construed so as to require the agents of foreign insurance companies to pay the percentage provided for in said statute on all policies of reinsurance as well as on all policies of direct insurance. Adamson v. Schreiner, 386.
See **Injunctions.**

HABEAS CORPUS.
Writ of — When denied — Liquor Tax Law.— Where on conviction in a County Court of a violation of the Liquor Tax Law the relator was sentenced to a term of one year in the penitentiary and to pay a fine, which was paid the same day, and the execution of the sentence of imprisonment suspended, and more than six months thereafter relator was arrested upon a warrant issued by the county judge and brought before the court which made an order that the order theretofore made suspending the execution of the sentence of imprisonment be revoked and relator committed to the penitentiary to serve for a period of one year as directed by the original sentence, and it appears that the course pursued by the court wholly ignored the whole scheme of probation as outlined in the statute, it must be concluded that relator was given the benefit of only a common-law suspension of the execution of the sentence and not one under the statute, and that upon revocation of said sentence it only remained to carry out the terms of the original judgment of conviction and that relator's application on habeas corpus for release from imprisonment, on the ground that the term thereof had expired, must be denied and the writ dismissed. People ex rel. Schindler v. Kaiser, 681.

HUSBAND AND WIFE.
When tenants in common — Contracts — Evidence — When securities not subject to transfer tax.—Where a husband and wife rent a safe deposit box they are tenants in common of the lease and securities which are the separate property of each placed in the box by one of them remain his or her property unless the ownership be changed by contract. Where upon the death of the wife there were found securities in the box concededly belonging to her

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HUSBAND AND WIFE — Continued.
and other securities, which originally belonged to her husband, were in an envelope indorsed to the effect that the contents, life insurance bonds, were the property of the wife, held, that in the absence of proof of delivery of the bonds to the wife and her acceptance thereof for the purpose of making a present gift the ownership of said bonds remained in the husband and were not subject to a transfer tax as a part of the wife's estate. Matter of Squibb, 475.

See **Dower; Evidence; Joint Owners; Penal Law; Services.**

INDICTMENT.

For manslaughter — Demurrer to — Omission to discharge duty under Labor Law.—An indictment charging manslaughter in the first degree and manslaughter in the second degree in separate counts against the owner of a tenant factory within the meaning of the Labor Law and his agent in charge of said building having the supervision, direction and control thereof, in which said building a fire occurred, after alleging that an individual was "burned, suffocated and died as a result of the injuries thus received," sets forth that the injuries and death were due to acts of omission of defendants and sufficiently alleges in what respect defendants failed in the discharge of their duty under the Labor Law to decedent, and defendants are thereby apprised of the particular acts of omission with which they are charged when read in connection with the preceding allegations in said count of the indictment for manslaughter in the first degree, a demurrer to the indictment on the ground that it does not appear upon its face that either of the crimes is charged and that the facts stated do not constitute either of the crimes charged will be overruled. People v. Diamond, 114.

INJUNCTIONS.

1. *To restrain discontinuance of stock quotations to patrons of telegraph companies — Contract between stock exchange and telegraph company regulating service.*—A stock exchange has an absolute property right in quotations collected and compiled by it, the value of which is measured by the publicity given them. Assuming that a telegraph company has a right to purchase such quotations from an exchange it has not the right to do so unless it has also the right to dispose of the information on equal terms to all who may legally require it; but as such information might be used unlawfully the stock exchange may control the business to the extent of requiring the telegraph company to refuse the service to any one making unlawful or improper use of it. Where, in an action to restrain defendants from discontinuing furnishing to plaintiffs quotations of the New York Stock Exchange by means of "tickers," it appears that plaintiffs have for years had such service and paid for it, and are prepared to pay for it in the future, and to conform to all reasonable regulations, and no claim is made that they or any of them have ever used or contemplate using the service for unlawful or improper purposes, and a contract between the stock exchange and the telegraph company provides that the patrons of the telegraph company, to receive the service, must be approved by the exchange, plaintiffs cannot arbitrarily be refused such service so long as it is furnished to others

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INJUNCTIONS — Continued.
in like business, and the burden of proof is upon the exchange to show a violation of the terms and conditions of the contract between it and the telegraph company if it undertakes to deprive a patron of the service. The private rights of plaintiffs involved being capable of enforcement in the courts, plaintiffs are not confined to an application to the public service commission when in the meantime their business is greatly, if not totally, interfered with; the remedy by injunction is the only one adequate for the situation. Tucker v. Western Union Telegraph Co., 287.

2. *Encroachments on building line — Greater New York Charter,* § 50 — *Code of Ordinances,* § 238 — *Damages to easements of light, air and access.*— Stone stairways of solid masonry leading to entrances of a building erected by the city of New York and extending about six feet beyond the building line of a street sixty-five feet wide violate not only section 50 of the Greater New York Charter, which provides that the city government shall have no power "to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk, except the temporary occupation thereof during the erection or repairing of a building on a lot opposite the same," but offend against section 238 of the Code of Ordinances of the city which permits ornamental projections, provided they do not extend "more than one-fifteenth part of the width of the street they are upon, nor in any case more than five feet beyond the building line," and an adjoining property owner will be granted a mandatory injunction requiring the city to remove from the sidewalk such obstruction. Hellinger v. City of New York, 394.

INSURANCE (ACCIDENT).
Conditions of policy of — Compliance with — Notice of accident. —A condition of a policy of accident insurance requiring the insured to give immediate notice to the insurer of any accident is to be interpreted as meaning that the insured shall give such notice after he has been apprised of the accident, or should have been had he exercised reasonable diligence. Where the insured is a storekeeper it is his duty to so regulate his business that he may be apprised with reasonable certainty of any accident that may occur in its conduct. If in such case, despite the exercise of reasonable care, the insured fails to acquire information as to an accident until sometime thereafter, but on its acquisition promptly notifies the insurer, he complies with the condition of the policy as to giving immediate notice. Christatos v. New England Casualty Co., 534.

INSURANCE (LIFE).
1. *Provisions of policy of — Misstated age — Evidence.*—Where a policy of insurance providing that if the age of the assured be misstated the amount payable should be such as the premium paid would have purchased at the correct age was issued upon the assumption that the insured was then sixty years of age, as stated in his application, when in fact he was sixty-six years of age, a recovery on the policy is limited to the amount of insurance the premium paid would have purchased at the correct age as the

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INSURANCE (LIFE) — Continued.
parties by their contract agreed. The application for insurance though not attached to the policy was material and competent evidence to show that the contingency had occurred which made effective the aforesaid provision of the policy. Edelson v. Metropolitan Life Ins. Co., 218.

2. *Assignment of policy when good — Estoppel — Actions — Validity of policy — Contracts.*—An assignment of an industrial policy of insurance by a married woman to one who advanced money so that the assignor and her family could go back to their old home in Austria is good as against the insured, and her husband having shared in the benefits of the proceeds of the assignment is estopped from disputing its validity. In this state the assignment of a policy of life insurance though to one not having any insurable interest in the life of the insured is good. If a volunteer furnishes money in an emergency to one whose life is insured and takes no assignment of the policy he cannot maintain an action thereon to recover benefits thereunder. Where the policy provided that it should be void if assigned or otherwise parted with and that the insurer might make any payment to any relative by blood or connection by marriage of the insured or to any other person appearing to be equitably entitled by reason of having incurred expense on behalf of the insured, the assignment in question was within the contemplation of the parties and upon the death of the insured the assignee was entitled to the proceeds of the policy. Though agents of life insurance companies may neither waive nor alter the clear recitals or provisions contained in the policy, their acts and representations may help in showing the company's interpretation of the policy. Where in an action upon the policy defendant pleaded that by its provisions the assignment thereof to plaintiff was avoided, the act of defendant in sending on checks payable to plaintiff while not a waiver or amounting to an estoppel might be considered in determining how defendant interpreted the policy, with all the facts before it. Defendant having recognized the validity of the policy by accepting proofs of the death of the insured without objection, and attempting to make payment to the assignee of the policy and by making or attempting to make payment to the public administrator was not in a position to attack the assignment as the only way to destroy its validity was to declare the policy void under the provision prohibiting its assignment. All the conditions and provisions of a life insurance contract which are favorable to the insurer are to be strictly construed and if reasonably susceptible of two constructions the ambiguity will be resolved in favor of the insured. Foryciarz v. Prudential Insurance Co., 306.

INTERSTATE COMMERCE LAW.
See Carriers.

JOINT OWNERS.
How established — Transfer tax — Agreement between a husband and wife as to joint ownership of securities — Contracts.—Where an agreement made in 1913 between a husband and wife of the first part and a trust company of the other part declares that securi-

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JOINT OWNERS — Continued.
ties which were the subject of the agreement were owned by the husband and wife jointly such statement is not so unalterably expressive of joint ownership that it could not upon resort to the circumstances be found consistent with ownership in common, but the circumstances tend only to the conclusion that joint ownership was intended and effectuated. A provision of the agreement "that the same might be revoked" was not applicable to the arrangement by which joint ownership was established but was confined to the recall thereof between the parties thereto. A stipulation of the agreement that the trustee should pay the income of the securities to the husband and wife in equal shares was not inconsistent with joint ownership, and the only transfer, whether of the securities mentioned in the contract or those which were later brought within its operation, was a transfer consummated in the lifetime of the decedent and was not then subject to a transfer tax, nor did it become so under chapter 664 of the Laws of 1915. Matter of McKelway, 473.

JUDGMENTS.

1. *When cannot be sustained — Husband and wife — Appeal.*— Where, in an action by the husband against the executrix of decedent for board furnished by plaintiff's wife to decedent, it does not appear who paid for and provided the food, or that it was served in plaintiff's house, a judgment in his favor cannot be sustained. Janz v. Schwender, 142.

2. *What constitutes — Motions and orders — Appeal.*— Upon the entry of an order granting leave to discontinue a Municipal Court action the clerk of the court noted in the docket book that the action had been discontinued on motion of plaintiff and that the disbursements were taxed and allowed, and later an order was granted striking out the taxation of disbursements. Held, that the entries in the docket book were made merely in the routine of the clerk to keep a record of the proceedings and did not constitute a judgment from which an appeal could be taken. A judgment may not be entered on an order granting leave to discontinue an action. Bien v. National Surety Co., 194.

3. *Motion for, on the pleadings — Trial — Pleading — Partnership — Code Civ. Pro.*, § 547.— Where a complaint entitles plaintiff to any relief, legal or equitable, even though the judgment demanded be not the precise relief to which he is entitled, defendant's motion for judgment on the pleadings under section 547 of the Code of Civil Procedure will be denied. A defendant by moving for judgment under section 547 of the Code of Civil Procedure admits all the allegations of fact contained in the complaint, and the court must assume that they are true, and defendant is only entitled to an order granting his motion where the pleadings are legally insufficient or no issue of fact is raised. Issues of fact must be determined at the trial and cannot be summarily disposed of on a motion for judgment on the pleadings. Upon a motion for judgment on the pleadings they must be liberally construed in favor of the pleader so far as matters of form are concerned, but the answer

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JUDGMENTS — Continued.
may not be considered in determining whether the complaint states facts sufficient to constitute a cause of action. Guggenheim v. Guggenheim, 332.

4. *Of Municipal Court of city of New York — Municipal Court Code,* § 93 (2).— Under section 93 (2) of the Municipal Court Code a judgment of the Municipal Court of the city of New York for a sum of money may be amended so as to accord with the correct calculation of interest. Mitchell v. Security Bank, 506.

5. *No authority to vacate — Municipal Court of city of New York.* —A justice of the Municipal Court of the city of New York has no authority to vacate a judgment entered by another justice of the same court. Myers v. Klein, 546.

6. *Dismissing action upon merits — Municipal Court Code,* § 125. — Under section 125 of the Municipal Court Code which declares that a judgment dismissing an action may be either on the merits or without prejudice to a new action, a dismissal upon the merits is equivalent to a judgment for defendants on all the issues. Brook v. Levinson, 567.

7. *Correction of — Reinstatement of — Evidence — Municipal Court Code,* § 6 (7).— Under section 6 (7) of the Municipal Court Code the Municipal Court of the city of New York upon the theory of correcting a judgment entered in favor of plaintiff and sustained by the evidence is without authority to enter judgment in favor of defendant on a counterclaim, and on motion the original judgment will be reinstated subject, however, to an application to correct and vacate it on sufficient grounds. Miller, Inc., v. Leahy Building Co., 616.

See **Assignments.**

JURISDICTION.

1. *Of City Court of Utica — To render judgment in excess of* $200 — *Laws* 1882, *chap.* 103.—The legislation relating to the jurisdiction of the City Court of Utica, since its creation by chapter 103 of the Laws of 1882 and the acts amendatory thereof, considered, and held that said court has jurisdiction to render a judgment in excess of $200. Maruccoro v. Cronk, Inc., 86.

2. *Of County Court — Pleading — When plaintiff entitled to equitable relief — Actions.*—An action to recover $1,150 for damages to real property is within the jurisdiction of a County Court and that the complaint alleges facts which, if proved, might entitle plaintiff to equitable relief does not render the complaint subject to a demurrer. Brown v. Quinlan, 95.

3. *Municipal Court Code,* § 15.— While the Municipal Court of the city of New York under section 15 of the Municipal Court Code may vacate a judgment entered in a case tried without a jury, the court has no jurisdiction to dismiss the complaint on the merits. Bradstreet's Collection Bureau v. Nagler's Brass Works, Inc., 188.

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JURISDICTION — Continued.

4. *Of Supreme Court and Surrogate's Court — Executors and administrators — Accounting.* — The jurisdiction of the Supreme Court and of the Surrogate's Court as to accounting by executors is concurrent and the surrogate has no power to compel the exercise of a power of sale of a testator's land by his executrix, but the Supreme Court will exercise jurisdiction of an action by creditors to compel an executor to account and sell land for the payment of their debts. While the representative of a deceased executor cannot administer such estate he is bound to account therefor. Rositzke v. Meyer, 356.

See **Actions; Replevin.**

LABOR LAW.

Section 18 — *Meaning of word "scaffold" — Action for personal injuries by employee.* — The principal function of a "scaffold" within the meaning of section 18 of the Labor Law and used in construction with the erection or alteration of a building or "structure" is to support in a convenient position the workmen engaged in the construction either while they are working in a fixed position or possibly even while they are passing to and fro while at work. A wooden form used and intended to be used exclusively as the frame work to contain and hold, while hardening, a section of concrete, but not for the purpose of supporting a workman, is not a "scaffold" within the meaning of said section 18 of the Labor Law. In an action by an employee who was injured by stepping on the wooden form used for laying concrete, an instruction which permitted the jury to consider the case as though a "scaffold" were involved and, as such, within said section 18 of the Labor Law, constitutes reversible error. Adelstein v. Roebling Construction Co., 125.

LANDLORD AND TENANT.

1. *Actual partial eviction not shown.*—Where in an action for rent the undisputed evidence showed that the storage by plaintiff on the premises of certain articles was with the consent of defendant who furnished a key to the building on request, none of the elements of an actual partial eviction are shown. In the circumstances there was an implied promise that plaintiff would pay for the use of the part of the building occupied by him. Hirschman v. Kuechle, 243.

2. *Summary proceedings to terminate relation — Damages for breach of covenant.* — In the absence of an express agreement to the contrary a landlord cannot recover for damages which accrued by reduced rentals received after the lease had been teminated by summary proceedings. A tenant's default in payment of rent for which he was dispossessed in summary proceedings cannot be regarded as being the cause of alleged decrease in rental value and is not an element of damage allowable to the landlord. Where a lease recites a deposit of money as security for the faithful performance of all the terms, covenants and conditions of the lease to be allowed on all damages from any breach, the landlord is only entitled to have recourse to the security to the extent of any damages arising during

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LANDLORD AND TENANT — Continued.
the tenancy by reason of a breach of the covenants expressly covered by the security under the terms of the lease. After summary proceedings to dispossess the tenant for breach of covenant the landlord may not recover moneys expended for repairs which the tenant was obligated to make under the lease, in the absence of proof that they were made necessary by any neglect of duty on the part of the tenant during the tenancy. Crausman v. Graham Construction Co., 608.

See **Lease.**

LAPSE.

When will be avoided — Bequests — Wills.— Lapse will be avoided by construing a bequest as substitutional whenever possible in the instance of commorientes. A direction in a will considered and held to have been intended to avoid a lapse and substitutional. Matter of Fowles, 48.

LEASE.

Renewal for further term — Evidence in action to recover rent — Failure to establish waiver of written notice.— Where a lease ending September 30, 1915, provides for a renewal for a further term unless either party should on or before June 1, 1915, give written notice of intention to surrender the premises or have possession of the same on September 30, 1915, and the evidence in an action to recover the rent for the month of October fails to establish a waiver by plaintiff of the written notice, a motion for the direction of a verdict in favor of plaintiff should have been granted. Campagna Construction Co. v. Woods, 179.

LIENS.

See **Foreclosure.**

LIQUOR TAX LAW.

See **Habeas Corpus.**

LUNATICS.

When judgment against, is void — Jurisdiction — Incompetent persons.—A judgment rendered against one committed by an order of the court to an institution for the insane is void for lack of jurisdiction where no committee of the person and property and no guardian had been appointed, and a mere order permitting service on a third person is not sufficiently broad to enable him to look after the interests of the incompetent. United States Trust Co. v. Kiddle, 381.

MANDAMUS.

See **Associations.**

MARRIAGE.

See **Evidence.**

MASTER AND SERVANT.

When relation does not exist — Negligence — Contracts.— Where the relation of master and servant or principal and agent does not exist, but an injury results from negligence in the performance of

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MASTER AND SERVANT — Continued.
work by an independent contractor, the party with whom he contracts is not responsible for his negligence or that of his servant. Bergen v. Morton Amusement Co., Inc., 647.

MONEY HAD AND RECEIVED.
Negotiable instruments — Actions — Mistake — Judgments.—A check payable to defendant was after indorsement by its agent and at his request cashed by plaintiffs, deposited in their bank and in due course collected from defendant's bank, and defendant, after procuring the canceled check, made affidavit that its agent was never authorized to cash or indorse it and requested repayment. Held, that in an action to recover the money repaid to defendant, on the theory of an action for money had and received arising brought out of a mistake of fact, a judgment in favor of plaintiffs should be reversed and the complaint dismissed. Fajen v. Hudson Transportation Co., 629.

MORTGAGES.
See **Foreclosure; Railroads.**

MOTIONS AND ORDERS.
See **Venue.**

MUNICIPAL CORPORATIONS.
See **Railroads; Taxes.**

MUNICIPAL COURT CODE.
§ 6 (7). Miller, Inc., v. Leahy Building Co., 616.
§ 15. Bradstreets Collection Bureau v. Nagler's Brass Works, Inc., 188.
§ 88. Snyder Co., Inc., v. Abrams, 225.
§ 92. Ward v. Jewish Leader Publishing Co., Inc., 571.
§ 93 (2) Mitchell v. Security Bank, 506.
– 93 (2) Levine v. Kosher Matzoths Baking Co., Inc., 565.
§ 125. Brook v. Levinson, 567.
§§ 125, 126. Levy v. Metropolitan Life Ins. Co., 556.
§ 129 (1). Kommel v. Bisgyer, 182.
§ 154 (2). Brand v. H. A. Improvement Co., 549.
§ 155. Levy v. Metropolitan Life Ins. Co., 556.

MUTUAL BENEFIT SOCIETIES.
Beneficiary named in certificate has no vested interest in same — Executors and administrators — Associations.— In the absence of any provision on the subject in the laws of a mutual benefit society the beneficiary named in a certificate issued to a member has no vested interest in the same which might in a contingency become payable on the death of said member. The account of an administratrix, so far as it fails to charge her with a sum received on a certificate of benefit insurance from a society which insured the life of her decedent, approved. Matter of Gebert, 477.

NEGLIGENCE.
1. *Corporations — Recovery in common law action — Pleading — Workmen's Compensation Law — Appeal.*— It is a matter of common knowledge that individuals and corporations operate

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NEGLIGENCE — Continued.
and own respectively enterprises and properties entirely unrelated to and independent of one another. Defendant conducts a brewery and while one of its drivers was delivering beer to a saloonkeeper at premises disconnected from the brewery he was injured by reason of the collapse of an elevator on the premises which were owned by defendant. Held, that the driver could recover against defendant in a common law action, and a dismissal of the complaint at the trial on the ground that the remedy given by the Workmen's Compensation Law is exclusive was error for which the judgment in favor of defendant should be reversed. Winter v. Doelger Brewing Co., 150.

2. *When burden on defendant to show freedom from — Evidence — Appeal.*— In an action for personal injuries the evidence on behalf of plaintiff must be taken as true on the hearing of an appeal from a judgment in her favor dismissing her complaint. Where in an action to recover for personal injuries it appears that a purchaser of goods in defendant's store fell through a door in the floor, which door when closed came even with the floor but which had evidently been left opened, the burden is upon defendant to show his freedom from negligence, as he impliedly invited plaintiff upon the premises which were under his entire control. Gallagher v. Halpern, 185.

3. *Presumption of — Burden of proof on carrier — What is not appliance for transportation — Evidence.*— Where personal injury results to a railway passenger from something improper or unsafe in the appliances of transportation, the burden of proof is on the carrier to show that such injury did not result from its negligence. Property belonging to and taken by a passenger into a railway car is not an appliance for transportation. The mere fact that a piece of baggage is in the aisle of a car and a passenger stumbles over it does not *per se* raise any presumption of negligence on the part of the carrier. Where it is as probable that an injury to a railway passenger resulted from the act of a third person as from the negligence of the carrier, the case should not be sent to the jury. Dusenbury v. Delaware, Lackawanna & Western R. R. Co., 241.

4. *Who guilty of — Evidence — Trial — Refusal to allow copy of traffic regulations to be taken to jury room.*— Where in an action to recover for loss of a horse and repairs to a wagon as the result of a collision at a street intersection in New York city the evidence is to the effect that defendant's motor truck was proceeding on the wrong side of the street and had made the turn at the street intersection before reaching the center of the street, and the jury upon the issue as to whether defendant's motor truck ran into plaintiffs' horse or whether the horse ran into the truck decided in favor of defendant, plaintiffs, upon a claim that defendant's driver did not comply with the city traffic regulations which require that a vehicle turning to the left into another street shall pass to the right of and beyond the center of the street intersection before turning, were entitled to have the jury charged that if they found that the course taken by defendant's driver was the wrong course

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NEGLIGENCE — Continued.
defendant was guilty of negligence in view of the fact that the court refused to allow a copy of the traffic regulations to be taken to the jury room. Jacobs v. Carvel Co., Inc., 252.

5. *Action to recover for personal injuries — Pleading.*— Under the allegations of the complaint in an action founded on the Employers' Liability Act to recover for personal injuries alleged to have been caused by the negligence of defendant's foreman, a notice stating as the cause of said injuries that while plaintiff was holding fast to the tongue of a truck with a lever attached to the center of the axle, used by defendant for the purpose of picking up an iron beam, the foreman negligently let go of the beam and it fell on plaintiff's foot, is sudcient to sustain the action. Chiappise v. Cranford, Inc., 264.

6. *Negligence — Action to recover for personal injuries — Evidence — Trial — Pleading.*— Where, in an action to recover for personal injuries sustained on a waiting platform at a railway station, the negligence of defendant is well pleaded, an allegation of the complaint that the platform was taxed beyond its capacity need not be proved; such allegation does not detract from the other negligence amply pleaded. Where there was evidence of continued undue pushing and crowding at certain points and of lack of provision for moderating or controlling it at the place where plaintiff was injured, it is error not to submit the case to the jury. Ulrich v. Interborough Rapid Transit Co., 588.

See Animals; Automobiles; Labor Law; Workmen's Compensation Law.

NEGOTIABLE INSTRUMENTS.

Pleading — Proof of tender of collateral — Designation of place of payment — Trial.— Where on the trial of an action on a promissory note secured by collateral and payable two months after date at a fixed place, the court being of opinion that a separate defense that plaintiff never tendered the collateral security upon demand for payment was good, plaintiff's counsel asked questions designed either to prove tender of the collateral at the time of the demand for payment or a waiver of or or excuse for such tender, an objection to the questions as immaterial, irrelevant and incompetent is not good, and, if sustained, a judgment for the dismissal of the complaint on the merits must be reversed for such error alone. The designation of a place for payment of a note does not make it incumbent as a preceding condition to create a liability against the maker of the note or give a recovery thereon that it should be presented at that particular place, but the omission or failure to make such presentment will relieve him from damages in case he was ready at the time and place to pay the note and there was no one there to receive the money. Defendant not having pleaded that he was ready at the time and place appointed to pay the note and that there was no one there to receive the money, the so-called separate defense did not constitute even a partial defense as against costs and interest. Gordon v. Benguiat, 132.

See **Corporations.**

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NEW TRIAL.

When granted — In action for rent — Motions and orders.— Where in an action for rent it was claimed that plaintiff's occupancy of a portion of the leased premises constituted an actual partial eviction and that defendant was entitled to an affirmative judgment for breach of covenant for quiet enjoyment or for use and occupation, the question of the fair and reasonable value of such use is for the jury, and where on motion to dismiss such defense and counterclaim made at the close of plaintiff's case defendant asks to go to the jury, and where on motion to dismiss such defense and countergranting of the motion to dismiss and denial of plaintiff's motion is error for which a new trial must be granted upon which the only issue to be tried is the value of the use of that portion of the premises occupied by plaintiff. Hirschman v. Kuechle, 243.

2. *When granted — Action to recover broker's commissions — Trial — Verdict.*— Where in an action by one real estate broker against another to recover an alleged agreed one-third of the commission received by defendant in the event of the sale, lease or exchange of a certain parcel of real estate, it is undisputed that a lease of said parcel and another was effected by defendant who received a commission, a verdict in favor of plaintiff for the full amount of one-third of the commission was clearly against the weight of evidence and the judgment entered thereon will be reversed and a new trial granted. Kraus v. Cammann, 262.

3. *Granting of — When order will not be disturbed.*— Where a trial judge on his erroneous conclusion that he should have directed in favor of defendant as matter of law grants a new trial the order therefor will not be disturbed where an examination of the record discloses that the result reached was just. Freeman v. Hyman, 591.

PARTITION.

Complaint in — Interest of widow of intestate — Dower — Code Civ. Pro., § 1533.— Where the only interest of the widow of an intestate, in premises of which he died seized, arises from her right of dower which has neither been admeasured nor assigned, and it appears that, without great prejudice to the owner, there can be no partition of the property, which since the death of the intestate has been occupied by his widow, she is entitled under section 1533 of the Code of Civil Procedure to have the complaint in an action brought for partition by a tenant in common of a vested remainder in the property dismissed, but without costs. Green v. Lampman, 723.

PARTNERSHIP.

Definition of "good-will" — Contracts — When firm name exclusive property of surviving partners — Transfer of decedent's interest in good-will of business not subject to transfer tax.— The "good-will" of a partnership business is an economic value recognized in law and denoting the chance of future profit while carrying on an established business of repute in public consideration. While "good-will" as so defined belongs primarily to the partnership as a whole, it may be the subject of disposition or contract *inter vivos*. Where by the express terms of a partnership agreement the firm

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PARTNERSHIP — Continued.
name upon the death of a member thereof becomes the exclusive property of the surviving partners, and it is obvious from the provisions of the partnership agreement that the parties thereto did not intend that the representatives of a deceased partner should receive from the surviving partners any financial consideration on account of the deceased partner's interest in the firm name, the transfer of decedent's interest in the good-will to the surviving partners by virtue of the partnership agreement does not constitute a taxable transfer under the provisions of the Tax Law. Matter of Borden, 443.

See **Contracts.**

PATENTS.

Assignment of — Granting of exclusive license — When liable to assignee for agreed royalty.— Where the owner of a patent, after granting to defendant an exclusive license to make and sell articles manufactured thereunder, assigns the patent but the licensee enjoys the benefits of his contract without molestation of any kind for its full term, he is liable for the agreed royalty to the assignee of the patent. Rosenthal Paper Co. v. National Folding Box & Paper Co., 235.

PAWNBROKERS.

1. *Licensed — When not liable for failure to deliver — Pledge.*— A licensed pawnbroker is not liable for failure to deliver a diamond ring pledged under an agreement that he was not to be accountable for its loss by robbery, where the ring was stolen from his place of business.— Seiden v. Stern, 255.

2. *Redemption of pledge — General Business Law,* § 44.— Under section 44 of the General Business Law, which declares that the holder of a pawn ticket shall be presumed to be the person entitled to redeem the pledge, the delivery of a pawn ticket is a valid consideration for the promise to redeem the property pledged. Stone v. Demarest, 543.

PAYMENT.

See **Statute of Limitations.**

PENAL LAW.

1. *When not a violation of — Telegraph companies.*— The furnishing by a telegraph company of stock quotations to others than those approved by the stock exchange is not a violation of section 552 of the Penal Law. Tucker v. Western Union Tel. Co., 287.

2. § 486(7) — *Husband under no legal liability to support wife's bastard child — Commitment to state industrial school.*—A husband is under no legal obligation to support his wife's bastard child and is not its legal custodian, and where on his complaint under section 486(7) of the Penal Law the child is committed to a state industrial school without notice of the hearing to the mother her petition that the custody of her child be awarded to her will be granted. Matter of Remske, 330.

§§ 1290, 1298, People v. Ostrosky, 104.

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PENALTIES.

Action to recover penalty — Refusal of service in restaurant on purely personal grounds.— Where one is refused service in a restaurant on purely personal grounds and not on account of race, creed or color, he has no right of action to recover a penalty under the Civil Rights Law as amended by chapter 265 of the Laws of 1913. Noble v. Higgins, 328.

PERSONAL PROPERTY LAW.

§ 66. *Service — Jurisdiction — Verdict.*— In construing section 66 of the Personal Property Law the date of mailing and the date of service must be considered as synonymous, to be excluded in reckoning time, and notice given by mail September seventeeen and received the next day for the sale of the chattels on October second gave the full fifteen days' notice as required by said section, and verdict is directed in favor of the respective defendants on the merits. Kurzweil v. Story & Clark Piano Co., 484.

PLEADING.

1. *Allegations of complaint — Fraudulent representations — Appeal.*— A complaint alleging that plaintiffs were copartners engaged as salesmen of silk factories; that defendant induced them to enter his employ upon the false representation that he was "the factor for various manufacturers of silk fabrics and that he was in a position at that time to become the factor of many others * * * that he was financially in a position to act as factor to silk manufacturers, being at that time financially able to execute any and all orders and to effectuate any and all sales that might or could be obtained or negotiated by the plaintiffs for him to the extent of $250,000 per year and over in the manner and custom of the said trade of selling silk merchandise by means of factors and commission agents" states a cause of action. While the complaint in such an action should allege that defendant made the alleged fraudulent representations with the intention that they should be acted upon, the point that the complaint contained no such allegation cannot be raised for the first time on appeal. Hurwitz v. Dryfoos, 147.

2. *Defense of new matter — Allegations contained in complaint — Denial — Answer.*— A defense of new matter within the purview of section 500 of the Code of Civil Procedure must be based on the theory of confession and avoidance and should not contain a denial except where a denial of the existence of some fact alleged in the complaint is necessary in order to perfect the answers as a complete affirmative defense, and in determining the sufficiency thereof all the allegations of the complaint not denied thereby are deemed admitted even though elsewhere denied by the answer. Mulinos v. Walkof, 165.

3. *In action for wrongful discharge— When defendant not entitled to counterclaim.*— In an action for wrongful discharge, defendant is not entitled to counterclaim for the amount of plaintiff's drawings in excess of his earned commissions, though the contract provides for a monthly statement showing "either in debit and

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PLEADING — Continued.
credit columns, settlements to be made monthly," where the only statement furnished by defendant was given more than five months after plaintiff's discharge. Strauss v. Wolfsohn Co., Inc., 171.

4. *In action on contract — Counterclaim — Municipal Court Act,* § 151.— Under section 151 of the former Municipal Court Act, which provided that a counterclaim must be a cause of action arising out of the contract or transaction set forth in the complaint or in an action on contract any other cause of action on contract existing at the commencement of the action, defendant in an action to recover wages as a chauffeur may counterclaim his damages for conversion of his car by plaintiff. Deders v. Wood, 197.

5. *Allegations contained in complaint — Contracts — Damages — Evidence — Carriers — Personal Property Law,* § 145.—Allegations of the complaint in an action for breach of contract to buy certain cement sacks, that plaintiff was at all times ready and willing to perform the agreement with respect to furnishing, selling and delivering the sacks and would have done so but for defendant's cancellation, notification, neglect and refusal to perform the contract on his part, are sufficient to show that plaintiff was able to perform if performance had not been prevented by defendant. An allegation of plaintiff's readiness, ability and willingness to perform the contract must be supplemented by an allegation of tender of performance or a waiver thereof by defendant. Where a complaint sets forth a cause of action on contract to sell goods and to deliver them when ordered within a certain time, an allegation of defendant's cancellation of outstanding orders and its refusal to give further orders is sufficient to show a breach of the contract, and a notification that defendant would not order or accept any further deliveries constitutes a waiver of further tenders where it is further alleged that plaintiff was to manufacture the goods to fill the orders. The court in such case cannot presume that the cancellation of the contract was wrongful. Where it appears that plaintiff up to the time of defendant's refusal to accept the sacks, and its cancellation of outstanding orders, had duly performed all other conditions of the contract and was ready to furnish, sell and deliver sacks in accordance with the terms of the agreement, the issue whether defendant's refusal was wrongful was sufficiently raised by the complaint though not expressly alleged. The plaintiff, under section 145 of the Personal Property Law, was entitled to prove its damages if defendant's refusal to accept the sacks was wrongful, without proof that it manufactured or bought the bags. The contract being silent as to the time of delivery of the sacks after an order therefor had been given, it would be implied that such delivery was to be made within a reasonable time. Whether defendant's cancellation of its order to deliver a second car-load and its refusal to give further orders were justified after notice from plaintiff that it could not deliver the second car-load for two or three weeks was a question for the jury, there being nothing in the evidence to permit an inference that in the circumstances such a delivery would not be within a reasonable time. Riegal Sack Co. v. Tidewater Portland Cement Co., 202.

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PLEADING — Continued.

6. *Allegations of affirmative defense — Answers — Contracts — Evidence — Code Civ. Pro.*, § 522.—Under section 522 of the Code of Civil Procedure the allegations of an affirmative defense that a contract under seal, a copy of which was annexed to the answer and made a part thereof, was the agreement set forth and referred to in the complaint, will be deemed to be controverted so that after defendant had put in the contract under seal to establish his defense plaintiff had the right to offer testimony showing want of consideration of fraud. Wiederman v. Verschleiser, 276.

7. *In Municipal Court of city of New York — Contracts — Corporations — What may be included in answer.*— In an action brought in the Municipal Court of the city of New York on a contract signed by the secretary of a corporation as such, defendant, under an answer which simply denies the making of the contract alleged in the complaint, is entitled to show that his secretary was not authorized to sign the contract because of defendant's failure to comply with section 92 of the Municipal Court Code which provides that "A signature to a written instrument which is pleaded shall be taken as admitted unless the party sought to be charged thereby files with the clerk, within eight days after joinder of issue, a specific denial of the genuineness of the signature and a demand that it be proved. Such denial and demand by a defendant may be included in his answer." Ward v. Jewish Leader Publishing Co., Inc., 571.

See **Dower; Evidence; Judgments; Negligence; Negotiable Instruments; Partition; Sales.**

PLEDGE.
See **Pawnbrokers.**

PROBATE.
See **Wills.**

PUBLIC SERVICE COMMISSIONS LAW.
See **Carriers.**

RAILROADS.

1. *Street — Municipal corporations — Right to fix fare — Power of legislature.*— The regulation of street railroads in cities, including the fare thereon, being germane to the powers and functions of municipal governments, the legislature has power, in an act amending the charter of a city generally, annexing to the city territory in which a street railroad is wholly situated, to fix the rate of fare on such railroad so as to provide for a five-cent fare for a continuous ride in the city. Willis v. City of Rochester, 686.

2. *Foreclosure of mortgage against — Right of purchaser — Waiver of purchaser — Deficiency — Code Civ. Pro.* § 1678.— As section 151 of the Railroad Law provides that an individual purchaser at the sale of a railroad may operate it for six months until a corporation has been formed for such purpose, the request of a purchaser of a railroad at a foreclosure sale for additional time to search the title and ascertain means to catalogue the property and

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RAILROADS — Continued.
for opportunity to form a new corporation to take over the operation of the road and its franchises furnishes no ground for granting an extension of time to complete the purchase. A railroad was sold in foreclosure under an order which provided that if any purchaser should fail to comply with the terms of sale the property should again be put up for sale upon the same terms, without application to the court, and that the purchaser would be held liable for any deficiency on a resale. Held, that under section 1678 of the Code of Civil Procedure where a bidder at the sale failed to complete his purchase in accordance with the usual terms of sale the referee to sell has no right to put the property up for sale at his office without publication. A purchaser of a railroad at a sale in foreclosure does not by refusing to complete his purchase waive his right to complain of a private sale of the property by the referee without publication of a notice of sale, though by an order of the court he was excused from payment of a deficiency. Matter of Philip, 709.

REPLEVIN.
Contracts — Conditional sales — Judgments.— Certain pianos sold to plaintiffs herein under contracts of conditional sale were replevied for nonpayment of installments due under the contracts. Defendants in the suit were never served with the summons but the sheriff in his return stated that he took the property from the possession of designated persons, the agents of defendants, and that he served on each of said agents a copy of the summons, affidavit, requisition, etc. Judgments were entered on such service but no proceeding was thereafter taken to cause a summons to be served on the defendants in the action. Subsequently to the entry of the judgment the property was sold at public auction in the replevin suit. In an action by defendants in the replevin suit to recover moneys paid under and pursuant to the contracts of conditional sales defendants claim to have sold the property in compliance with sections 65 and 66 of the Personal Property Law. Held: That the court having jurisdiction of the subject matter in the replevin suit the judgments therein entered were regular and conclusive as against the plaintiffs herein until reversed or set aside by direct attack. Kurzweil v. Story & Clark Piano Co., 484.

See **Assignment for Benefit of Creditors.**

RESTAURANTS.
See **Penalties.**

SALES.
1. *Delivery — In whom title remains — Appeal — Personal Property Law,* § 100.— Upon the sale of a diamond ring a stipulation by the seller to deliver it to the buyer at a particular place is an essential part of the transaction, and under rule 5 of section 100 of the Personal Property Law (Laws of 1911, chap. 579) the title to the ring remains in the seller until delivery is made as agreed. Plaintiff's assignor bought a diamond ring in defendant's store and it was agreed between the buyer and the salesman that the ring should be delivered to the buyer at a particular place, but when the sealed box in which the ring had been securely wrapped was opened at the

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SALES — Continued.
place of delivery the ring was missing. In an action by the assignee of the buyer, held, that until delivered as agreed the title to the ring remained in the seller and a dismissal of the complaint on the ground that the title to the property was in the buyer will be reversed. Conroy v. Barrett, 247.

2. *Conditional — Contracts — Pleading — Personal Property Law*, §§ 65, 66.— Where a piano, sold under a contract of conditional sale, was taken by the vendor in replevin and sold, and upon the face of the complaint in an action by the vendee to recover the amount paid on the contract it appears that no judgment was entered in the replevin action, a denial in the answer of an allegation in such complaint that the piano was not sold in compliance with the provisions of sections 65 and 66 of the Personal Property Law raises an issue of fact, and an order granting plaintiff's motion for a judgment on the pleadings will be reversed. Lowy v. Hardman, Peck & Co., 518.

3. *Warranty — When action to recover purchase price will not lie — When warranty cannot be construed as waiver.*— Where motor truck wheels sold under an express warranty for a year prove defective after a few days' use an action by the seller to recover the purchase price will not lie. The retention by the buyer of an invoice in which an attempt was made to modify the warranty cannot be construed as a waiver thereof, nor can the retention of the wheels to allow the seller time to furnish satisfactory wheels have such effect. Sipe v. National Silk Dyeing Co., 620.

4. *Conditional — Action to foreclose lien of contract — Trial — Evidence — Pleading.*—All installments of the purchase price under a contract for the conditional sale of certain fixtures and like articles relating to the equipment of a cigar and stationery store conducted by defendant were paid except two represented by notes given by the buyer, and the contract provided that for failure to pay any installments upon maturity all future installments should immediately become due and payable. In an action to foreclose the lien of the contract and to have the property covered thereby sold, based upon an alleged default in the payment of the first of the unpaid installments of the purchase price, it appeared that defendant upon receiving notice that his notes were held by a trust company and bank mailed to it at maturity a certified check payable to the order of the bank which the trust company received and returned the same day and presented the note for payment at defendant's address and protested it for nonpayment. Held, that defendant having already paid the note according to his justifiable understanding was entitled to disregard a demand that he take the matter up with the bank; that such demand would not support the action. It having been stipulated on the trial that plaintiff had put the four notes given in the transaction in the hands of the trust company and bank, a letter from the trust company mailed to defendant acknowledging the receipt and return of the certified check, was admissible in evidence. Pinsky v. Goldsmith, 640.

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SAVINGS BANKS.

When account opened in name of husband and wife — To whom deposit belongs — Evidence.— Where at the time a savings bank account was opened in the names of husband and wife there was no proof as to the ownership of the funds deposited, or any part thereof, in the absence of evidence of an agreement or intention that the deposits were jointly owned, or that either party to the account should take by survivorship, the deposit belongs to the wife who survived her husband and forms no part of his estate. Matter of Missionary Society of Most Holy Redeemer, 76.

SERVICE.

Proof of — Municipal Court of the city of New York — Process — Jurisdiction — Motions and orders — Municipal Court Code, § 129. — Upon a motion to open a default taken in an action brought in the Municipal Court of the city of New York the question raised by the allegations of the moving papers to the effect that the court had not obtained jurisdiction of the defendant by service of process is one of fact to be determined by the trial court "upon affidavit or otherwise" as provided by section 129 of the Municipal Court Code, and if the fact of nonservice is disputed plaintiff must meet the issue by proof of service. Wagreich v. Le Vien, 645.

SERVICES.

1. *Rendition of personal — Evidence when inadmissible — Husband and wife — Code Civ. Pro.* § 829.— Under section 60 of the Domestic Relations Law a wife has the exclusive cause of action for the rendition of personal services and, in an action by her husband for services rendered by her on her own account as a nurse to one since deceased, her testimony as to transactions with the decedent is inadmissible under section 829 oof the Code of Civil Procedure as that of a person "interested in the event." Janz v. Schwender, 142.

2. *Performance of — Implied promise to pay for* — Where one performs services for another with his knowledge and consent by reason of which the other is benefited there is an implied promise to pay therefor. Hirschman v. Keuchle, 243.

See Assignments; Corporations.

SPECIFIC PERFORMANCE.

When not entitled to decree of — In action to remove cloud on title — Deeds — Contracts.— A written instrument, drawn by defendant who was not a lawyer, whereby he offered to give plaintiff $25,000 for his farm, provided for the payment of $100 down and "six months after or before" $9,900 of the purchase price and for a mortgage for the balance of $15,000 to plaintiff who was to give a warranty deed, was signed by both parties and $100 paid to plaintiff. In an action to remove a cloud on the title, held, in accordance with the practical construction of the parties, that the agreement could not be construed otherwise than that when the $9,900 was paid and the mortgage given the deed was to be delivered, and when on the day that sum was to be paid plaintiff tendered to defendant a properly executed deed of the premises and notified

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SPECIFC PERFORMANCE — Continued.
defendant, who refused to pay, that the agreement was terminated and also refused to grant any extension of time, plaintiff was entitled to maintain an action for the cancellation of the agreement which was recorded in the county clerk's office by defendant nearly two months after the default in making payment of the $9,900. Whether the agreement was to be regarded either as a land contract or a mere option to purchase it must be held, in view of plaintiff's inquiry of defendant before the day the $9,900 was to be paid whether or not he expected to fulfill his agreement, that time was of the essence of the agreement but if under the terms thereof the matter was in doubt the action of the parties clearly made it so, for when plaintiff refused defendant's request for an extension of payment for an indefinite time they then and there made time of the essence of the transaction. It would be a manifest injustice to plaintiff to hold him indefinitely under an agreement to sell the farm when so small a payment had been made upon property which was increasing in value, when defendant defaulted in his first substantial payment and gave no reasonable encouragement as to when any future payment would be made, and thedefore, in the circumstances defendant was not entitled to a decree of specific performance of the agreement which he alone had violated. Charlton v. Sheil, 321.

STATUTE OF LIMITATIONS.

1. *When, begins to run — Disputed claims against estate — When claim allowed.*— Upon the hearing of a disputed claim against an estate it appeared that claimant docketed a deficiency judgment in foreclosure against decedent and another, having theretofore signed an agreement at the request of their attorney by the terms of which claimant was not entitled to enforce any deficiency judgment by execution until after the death of both defendants in the foreclosure action. It further appeared that both said agreement and a deed of certain real estate by decedent were recorded together. The other defendant in the foreclosure action died before the decedent herein, who used said agreement to discharge the lien of the deficiency judgment upon the real property sold after the docketing thereof. Held, that because of said agreement the Statute of Limitations did not begin to run until the death of decedent herein, and that the claim should be allowed, with interest from the date of entry of the deficiency judgment. Matter of Sanford, 3.

2. *When payments by executrix on debt due from her testator prevent running of.*— A debtor died before the Statute of Limitations had commenced to run against his debt and his executrix before such time made payments of principal and interest on the debt and her executor promised by letter to make payment on account and did, in fact, make several payments of interest. Held, that the assignee of the creditor was entitled to maintain an action against the executor of the deceased representative of the estate of the original debtor and to compel an accounting and to have the personal property applied in payment of said debt and, if that were insufficient, to compel a sale of the real estate under the power of sale contained in the debtor's will. Letters written by the executrix

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STATUTE OF LIMITATIONS — Continued.
of the debtor must be regarded as having been made in her capacity as executrix, and that the creditor deferred enforcement of his claim without any definite agreement of forbearance was a mere indulgence and insufficient as a consideration for her promise to pay the debt. Payments by an executrix on a debt due from her testator prevent the running of the Statute of Limitations. Payments by the executor of the executrix of the original debtor prevented the running of the Statute of Limitations for six years as in making such payments said executor was not a mere volunteer or stranger to the transaction. Rositzke v. Meyer, 356.

See **Executors and Administrators.**

STATUTES.
See **Constitutional Law.**

SUMMARY PROCEEDINGS.
See **Landlord and Tenant.**

SUMMONS.
When void — Code Civ. Pro., § 3135.—A summons issued by a justice of the peace with a blank therein either as to the date or otherwise is void under section 3135 of the Code of Civil Procedure which requires that such a summons must be "entirely filled up" and delivered to an officer to be executed. Title Guarantee & Trust Co. v. Johnson, 101.

SURETIES.
See **Estoppel.**

SURROGATE'S COURT.
See **Accounting; Discovery.**

SURROGATES' LAW.
See **Trial.**

TAX LAW.
See **Constitutional Law.**

TAXES.
1. *Gift of income to wife during life with power to dispose of one-half of remainder by will — When not subject to transfer tax — When remainder taxable — Tax Law*, § 230.— Decedent gave the income of all his estate to his wife during her life, with power to dispose of one-half of the remainder by her will. He also empowered her to use so much of the principal of the estate as she considered necessary for enjoyment and support, and provided for the disposition of any part of his estate not used by her during her lifetime, or disposed of by virtue of the power of appointment. Held, that one-half of the remainder over which the widow was given the power of appointment was not presently subject to a transfer tax. Under the provision of section 230 of the Tax Law that where property is transferred in trust and the interests of the transferees are dependent upon contingencies whereby they may be defeated the tax shall be imposed upon such transfer at the highest rate, subject to return on the happening of a contingency whereby the prop-

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TAXES — Continued.
erty comes to a person exempt from the tax, the one-half of the remainder not subject to appointment is forthwith taxable. Matter of Neher, 68.

2. *Tax Law, § 24 — Who entitled to money collected for taxes on stock of bank — Actions — Municipal corporations.* — Under section 24 of the Tax Law a city, which in and of itself is a tax district within a county, is alone entitled to the money collected for taxes on the stock of a bank located within said city. A contention that as the complaint in an action by the county against the town in which the city was located to recover certain moneys erroneously paid to defendant upon a distribution of the amount paid for taxes on the stock of a bank located in said city alleged that said moneys were paid to the town voluntarily through inadvertence and mistake of law, they could not be recovered back, was untenable under the doctrine that voluntary payment cannot be invoked by a defendant to enable him to retain the money of a municipality illegally paid to him. Under said section 24 of the Tax Law the county had such a special interest in the moneys so erroneously paid to the town that it could maintain an action to recover the amount so paid which legally belonged under the statute to the city in which the bank was located. County of Erie, v. Town of Tonawanda, 663.

TENANTS IN COMMON.
See **Husband and Wife.**

TENDER.
Payment into court — Pleading — Negotiable instruments — Evidence. — A tender and payment into court of the amount of the note given for one of the unpaid installments of the purchase price was sufficient and the effect thereof was not destroyed by a counterclaim for damages based on a partial breach of the contract of conditional sale nor was plaintiff under necessity of putting in any evidence in support of the *prima facie* case on the note. Pinsky v. Goldsmith, 640.

See **Negotiable Instruments.**

TRADE CUSTOMS.
See **Evidence.**

TRANSFER TAX.
See **Joint Owners; Partnership; Taxes.**

TRANSPORTATION CORPORATIONS LAW.
§ 23 — *Receipts from operation — Subject to license fee* — Moneys received by a coach company from the leasing of space in its stages for advertising purposes are receipts from the operation of its routes within the meaning of section 23 of the Transportation Corporations Law and hence subject to the license fee therein provided upon gross receipts from such operation. City of New York v. Fifth Avenue Coach Co., 366.

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TRIAL.

1. *In contested probate proceeding — New Surrogates' Law — When motion for new trial denied.*— The course of a jury trial in a contested probate proceeding rests largely in the discretion of the surrogate presiding at the trial, and where the order of proof and the conduct of the trial on the issues submitted to the jury under the new Surrogates' Law were correct a motion for judgment on the findings of the jury in favor of the will will be granted and a motion for a new trial denied. The practice on the trial of contested probate proceedings with juries under the new Surrogates' Law indicated. Matter of Vetter, 63.

2. *Refusal to permit trial to proceed — Evidence — Appeal.*— Where the attention of the trial judge was called by defendant's counsel to the fact that his introduction of evidence had not been completed, even though the court had stated that judgment would be entered in favor of plaintiff it was its duty to recall such statement and permit the trial to proceed until counsel had finished with his defense, and the refusal of the court to do so was prejudicial and deprived defendant of a substantial right calling for the reversal of a judgment in favor of plaintiff. Deders v. Wood, 197.

3. *In action to recover for loss of services — Infants — Automobiles — Submission to jury — New trial.*— Where in an action to recover for loss of services of an infant injured by defendant's automobile the testimony of the chauffeur that he was using the car on his own business is uncontradicted, the presumption of liability arising from ownership of the car requires that the case should be submitted to the jury. Freeman v. Hyman, 591.

See Venue.

TRUSTEES.

1. *Testamentary — Intermediate judicial settlement of account — Executors and administrators — Wills — Accounting by trustees.*— In a proceeding brought for the intermediate judicial settlement of the account of testamentary trustees, the testator's will left one-third of the residuary estate to trustees named in trust for the benefit of his widow for life with remainder to his surviving children and their lawful issue in equal shares and two-thirds thereof to the said trustees to invest and keep invested for the benefit of his children to be divided equally among them and their descendants on terms and conditions set forth in the will. The accounts of the executors of the estate were judicially settled and the account filed by the trustees in this proceeding showed that they held on deposit with a corporation a balance of an indebtedness of the testator which was turned over to them by the executors of the estate now amounting to $100,347.60 and a balance of dividends declared of $1,314.92 and rent amounting to $1,000, both of which accrued since the executors accounted. Ten infants are beneficiaries under the will, either present or contingent. The special guardian representing them filed objections to the main items referred to above and also to the items with which the trustees have credited themselves on behalf of each of the beneficiaries and thereby put in issue the right of the trustees to leave these amounts

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referred to on deposit with the said corporation as an investment of trust funds. The adult beneficiaries consent that the said amounts remain invested as stated by the trustees in their account. The eighth paragraph of the will empowered the trustees to invest the trust funds in such manner as they in their unrestricted discretion should deem best without being limited to such forms of investment as are authorized by law for the investment of trust funds, and the fourth paragraph provided that during the minority of any beneficiary the trustees might in their discretion accumulate the income from the share of such beneficiary or use the whole or any part thereof for his benefit at any time during his minority. The estate owned eighty per cent of the stock of the corporation and all of the trustees were directors, one was the president and two of them were stockholders of the said corporation with which the items in question are deposited and which used them as a part of its working capital. In sustaining objections filed by the special guardian, Held, (1) That the issues in this proceeding were not adjudicated in the judicial settlement of the executors' accounts; (2) That any accumulated income in the hands of the trustees might be invested by them in the same manner and on the same securities upon which they are authorized too invest the principal; (3) That the trustees cannot treat the amounts referred to as legal investments in the absence of special authority conferred upon them by the testator in his will; that the creator of a trust may prescribe how the investments shall be made and on what security; and that the courts have always looked with disfavor upon the investment of trust funds in enterprises where the interests of the trustees as individuals may come in conflict with their interests in the fiduciary relation; (4) That the fact that the testator allowed moneys due him for balances of unpaid profits to remain in the treasury of the corporation as a part of its working capital, does not of itself justify an exercise of discretion by the trustees which would continue the same as an investment; that if under the powers given them it would have been improper to invest the trust funds by loaning them to the corporation to be used as a part of its working capital, it would be equally improper to treat such a loan already made as an investment of trust funds and continue it as such; that it was not a proper exercise of discretion by the trustees under all the circumstances of this matter too treat the amounts above as investments of trust funds. (5) That there is no rigid or arbitrary standard by which to measure the reasonable time which the trustees were obliged to insist upon a payment of the amount of $100,347.60; that what is a reasonable time must depend upon the circumstances of each particular case; that the test is whether the trustees have used that diligence and prudence in converting the debt into cash which careful and intelligent men would have used in the management of their own affairs. (6) That a construction will not be favored which would make it incumbent upon the trustees to withdraw immediately from the working capital of the corporation the large amount of money which the testator had left with it; that such an intention cannot with reason be imputed to him for the reason that it could not have been his wish to imperil the corporation in which he was so largely interested by so drastic an

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TRUSTEES — Continued.
exercise of power by the trustees; and that it was the testator's intention to leave it to the discretion of his trustees as to the time when and the manner in which this debt should be collected. (7) That the trustees should be charged with the said item of $100,347.60, not as cash, but as a debt due from the corporation to them as trustees, and be surcharged with so much of the said items of $1,314.92 and $1,000 as they have deposited with or loaned to the corporation as trustees for infant beneficiaries. (8) That the adult beneficiaries of the various trust funds by their consents are estopped from questioning the propriety of leaving the last mentioned items of dividends and rent on deposit with the corporation as an investment, and in case they should as provided by the will become entitled to a part of the item of $100,347.60 they are estopped from questioning the form of investment thereof as stated by the trustees. Matter of Keane, 25.

2. *Gift to executors in trust — When title vested in representatives — Provisions of decree on judicial settlement of accounts.*— A gift to executors in trust for a certain person, the income to be handed to her and at her decease the principal to "go to" her daughter who was living at the time the will took effect, is a vested remainder, and upon the death of the remainderman title vested in her representatives, and there being no unpaid debts and no ancillary representative in this jurisdiction, all parties being before the court, the decree upon the judicial settlement of the account of the proceedings of the testatmentary trustee should provide for payment to those entitled directly. Matter of Van Kleeck, 40.

See **Trusts.**

TRUSTS.

1. *Devise in trust — Infants — Wills — When devise to trustees subject to power of sale — Accounting by trustee.*— Testator, who left but one minor child, gave one-third of his estate to his executors in trust to pay the net income to his wife during her life or widowhood, with direction in the event of her death or remarriage to pay to testator's children then under age the net income of a separate one-fifteenth of said trust estate. Held, that in the event of death or remarriage of testator's widow each child then of age took one-fifteenth of the fund as a devise. Where as to the remaining two-thirds of testator's estate one-fifth or two-fifteenths of the estate was devised to each child who should be of age at the death of testator, and child then under age took a devise in trust of one-fifteenth of the estate the net income thereof payable to him during minority and the principal of such two-fifteenths at his majority. Where a devise of testator's lands whether to trustees or individuals is subject to a power of sale in the executors alone, though they are also the trustees, they, on accounting as trustees, are only entitled to commissions upon that portion of the estate devised to them in trust. Matter of Magenheimer, 73.

2. *Creation of, by deed — Power of sale — Executors and administrators — Trustees — Equitable conversion.*— Where by a trust deed conveying both real and personal property the income of the

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TRUSTS — Continued.
estate is to be paid to the creator of the trust during her lifetime and upon her death the estate to be delivered to her administrator, the personal property of the estate upon the death of the beneficiary should be turned over to her administrator who before said property is turned over to him should be required to file a further bond in a sum to be fixed by the decree. Any charges arising from or growing out of the real property covered by said deed of trust and falling due after the death of the beneficiary should be paid from the proceeds of the real property under the discretionary power stated in the deed. The expenses of closing out the trust estate composed of real property including the trustee's commission should be paid out of the proceeds of the sale of the real property. Whether the issue of deceased cousins of the beneficiary are entitled to share in the remainder of the trust estate is a question that shoould be left for determination by the Surrogate's Court upon the accounting by the administrator. As by the deed of trust the trustee was given a power of sale which survived the life beneficiary it created such an express trust of the power and authority of the trustee as to constitute an equitable conversion of the realty into personalty. United States Trust Co. v. Kiddle, 381.

VENUE.

Motion to change place of trial denied — Damages — Code Civ. Pro., § 768.— While an action to recover damages because of the alleged negligence of defendant which resulted in the death of plaintiff's intestate should be brought in the county where both parties to the action reside the plaintiff may lay the venue in the county where the cause of action arose. Where on a motion to change the place of trial to the county where both parties reside, as the proper county, plaintiff under section 768 of the Code of Civil Procedure, as amended, which provides for the service of answering affidavits before the hearing of the motion and for the granting of affirmative relief to the adverse party, serves answering affidavits asking for the trial of the issue in the county where the venue is laid on the ground of the convenience of witnesses and because justice will be thereby promoted, and the court so concludes, the motion of defendant will be denied and plaintiff's motion granted. Buxbaum v. Paulsen, 717.

VERDICT.

When error to set aside — Trial.— It is error to set aside a verdict merely because the trial judge did not agree with the jury. Levine v. Levine, 187.

WAIVER.

Partnership — Municipal Court Code, § 88.— In a Municipal Court action on a partnership liability the right of a defendant to have his partners joined as defendants is waived unless taken by motion under section 88 of the Municipal Court Code. Snyder Co., Inc. v. Abrams, 225.

WAREHOUSEMAN.

Provision of warehouse receipt — Sales — Contracts.—A provision of a warehouse receipt that no title to whiskey sold should

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WAREHOUSEMAN — Continued.
pass until full payment of the purchase price in cash at the executive office of the seller constitutes notice to the purchaser that the seller's agent had no authority to receive payment. McNamara v. United Distillers Co., Inc., 561.

See **Contracts.**

WARRANTY.
See **Sales.**

WILLS.
1. *Construction of — Execution of — When extrinsic evidence admissible — When lapse avoided.*— In the absence of proof of actual survivorship there is at common law no presumption of survivorship or simultaneaus death where persons perish in a common disaster. Extrinsic evidence is inadmissable in the construction of wills except in three specific instances: (1) latent ambiguity; (2) to rebut a resulting trust, and (3) a patent ambiguity susceptible of resolution thereby. Extrinsic evidence of the circumstances surrounding a testator at the time of the execution of his will in inadmissible where the instrument is clear and free from equivocation. A testator's direction to a court to reverse a rule of law is contrary to public order. Where a will is susceptible of two constructions that which validates it will be preferred. Matter of Fowles, 48.

2. *Execution of —Contested probate proceeding — When bill of particulars denied — Exercise of undue influence.*— In a contested probate proceeding an application for a bill of particulars which must state the names of the persons who, as alleged by contestant, exercised undue influence on testator in the matter of the execution of the will, will be denied. Matter of Vetter, 62.

3. *Direction to pay debts — Power of sale as to real estate — Executors and administrators.*— Where in the will of the original debtor a direction to pay his debts was coupled with an imperative power of sale as to his real estate in the executrix who was also the sole devisee and legatee, it was not incumbent upon plaintiff to show that the personalty was insufficient for the payment of debts. Rositzke v. Meyer, 356.

4. *Revocation of prior.*— A last will which makes a full and complete disposition of all of the property of testatrix amounts to a total revocation of any prior will and, therefore, need not contain a revocation clause. Matter of McMullen, 404.

5. *Attesting witnesses— Evidence — When probate denied.*— The attesting witnesses of a will in direct contradiction to the statements contained in the attestatioon clause testified that the decedent was unconscious when the alleged will was executed, that he did not declare it too be his will nor ask them to act as witnesses and that the cross mark which appeared in lieu of his signature was made with the assistance of another who was present at the time and guided the decedent's hand. The testimony of another witness who was present at the time the alleged will was executed was to the

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WILLS — Continued.
effect that it was duly executed. Held, in denying probate, that the due execution of a propounded document may be shown by witnesses other than the attesting witnesses; that as a rule the testimony of such witnesses is not entitled to the same weight as is given to that of attesting witnesses; that a will may be admitted to probate even against the testimony of the attesting witnesses; that the burden of proving the execution of the propounded instrument with the formalities as required by law and by a competent testator still remains upon the proponent, and that the proponent in this matter had failed to sustain the burden placed upon him. Matter of Christoffel, 432.

6. *Construction of — Devise of real estate in trust — Provisions for disposition of income as well as corpus of estate after death of life tenant deferred — Code Civ. Pro.* § 2615.— Testator devised all his real estate in trust to pay over and apply one-third of the income to the use of his wife for her life with direction to divide the remaining two-thirds equally among his three children during the life of their mother. Testator's wife and all his children survived him, then one of his daughters died intestate leaving her surviving three children who subsequently died intestate without issue them surviving and leaving her husband as their sole next of kin. On petition of the trustee for a construction of the will as to the disposition of the income bequeathed to testator's children during the life of their mother, held, that the daughter of testator who died took a vested interest in one-third of two-thirds of the income during the life of her mother, and upon her death her interest in the income passed to her husband and children and upon the death of all the children their father succeeded to their interest and was entitled to two-ninths of the income during the life of testator's widow. A construction of that part of the will providing for the disposition of the income as well as the corpus of the estate, after the death of the life tenant, deferred until such happening under section 2615 of the Code of Civil Procedure. Matter of Klumpf, 436.

7. *Power of sale not exercised — When widow entitled in transfer tax proceeding to have value of dower deducted from appraised value of real estate.*— Where the personal property of a testator is ample to set up a trust fund for the benefit of his son, his widow, to whom was devised all of testator's real estate subject to the executors' power of sale which has not been exercised, is entitled in a transfer tax proceeding to have the value of her dower deducted from the appraised value of the real estate, testator indicating no intention to deprive her of dower. Matter of Browning, 459.

8. *When admitted to probate as will of personal property may be also admitted as will of real property.*— Where a will relating to both real and personal property is probated as a will of personal property only, it may, on allegations that at the time it was offered for probate proponent was ignorant of the existence of any real property, be admitted to probate as a will of real property also. Matter of Neil, 463.

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WILLS — Continued.

9. *Opinion of expert excluded — Undue influence — Evidence.*— The opinion of an expert as to the genuineness of a testator's mark properly excluded. Undue influence always imports coercion destructive of testator's volition or freedom of will and is tantamount to force or fear. An issue of undue influence should not be left to the jury unless reasonable evidence is given that the person charged had influence over testator and exercised it to the extent of coercion and that such exercise was the *causa causans* of the alleged will. Matter of Caffrey, 466.

See **Gifts.**

WITNESS.

Hostility of, may be shown — When exclusion of testimony as to ill-feeling of witness toward defendant calls for reversal of judgment of conviction.— It is well settled that testimony to prove the existence of hostile relations between a witness and the party against whom he is called is competent and material. Where on a charge of disorderly conduct involving abusive language to and an assault upon a woman made against defendant, a member of the bar in good standing, the complainant is supported in her version of the alleged disorderly conduct by her sister and defendant's explanation of what occurred was corroborated by his wife he is entitled to show by cross-examination that the testimony of complainant and of her sister was based on malice and that their conduct towards him was induced by feelings of resentment arising from the fact that he had brought certain actions at law against their brother with whom they resided, in one of which the complainant was surety on an undertaking given on appeal, and the exclusion of such testimony is error calling for the reversal of judgment of conviction rendered against defendant. People v. Kadel, 514.

See **Evidence; Wills.**

WORKMEN'S COMPENSATION LAW.

Sections 10, 20 — *Hazardous employments — Pleading — What states a cause of action — Negligence.*— Section 10 of the Workmen's Compensation Law after specifying what are to be deemed hazardous employments provides: "Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an *accidental* personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of said injury." Held, that a complaint alleging in substance that the defendant negligently failed to furnish and provide the plaintiff while in its employ "with reasonably safe implements, appliances, ventilators, fans, blowers or other devices * * * for the carrying away of poisonous and dangerous gases and fumes; in permitting and allowing poisonous gases and fumes to accumulate and remain in and about the place in which this plaintiff was required to work, * * * and through the carelessness and negligence of defendant" in other ways failing and neglecting to perform certain alleged duties for the proper and reasonable safety of the plaintiff,

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WORKMEN'S COMPENSATION LAW — Continued.
whereby it is alleged the plaintiff inhaled certain poisonous gases and fumes, which occasioned permanent injuries to his lungs and other portions of his body, states a cause of action. Under section 20 of the Workmen's Compensation Law which requires the commission to determine the claim before it for compensation and declaring that its decision shall be final as to all questions of fact, a finding that injury to the plaintiff was not due to accident is *res adjudicata* as to the fact as to whether the injury was accidental and precludes further inquiry on the point. If the compensation commission was in error in making the finding as to whether plaintiff's injury was accidental, his only remedy was an appeal from such decision as provided by section 23 of said law. Naud v. King Sewing Machine Co., 676.

See **Negligence.**

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